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To Pay or Delay: The Nominee's Dilemma Under Collection Due Process

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Although the Internal Revenue Service affords preseizure due process rights to the recipients of fraudulently conveyed property in a tax collection action, it does not afford similar rights to alleged nominees of the tax debtor. The sole legal difference between these groups, according to the Internal Revenue Service, is the intent of the transferor as determined by the collection agent assigned to the case. We argue that this distinction is not a meaningful determinant of the appropriate level of due process afforded to each group in the lien stage of tax collection actions and that alleged nominees must be afforded the same modicum of protection given to tax debtors and the recipients of fraudulently conveyed property. The critical inquiry, whether the Service may lien upon and later seize property in someone's possession without a preseizure review, has the same import for each group. Therefore, preseizure due process rights afforded by Congress to the recipients of fraudulently conveyed property should apply to both groups or to neither.

I. INTRODUCTION

Margo had no idea, when she met Henry at the Sunnyway Food Market, that the Internal Revenue Service would seize her modest Greencastle, Pennsylvania, home. She was a check-out clerk, and Henry, a handsome and talented cash-and-carry carpenter, swept her off of her feet. Within months, she had moved into his townhouse, just a couple of miles from I-81. The couple shared a car and shared their savings so that Margo could work part-time. When their romance faded, they parted on friendly terms. Henry transferred the townhouse to Margo and he, in turn, took the couple's savings and bought an identical townhouse two blocks away.

Unbeknownst to Margo, Henry was an Ayn Rand devotee who had not filed a tax return or paid a single cent of taxes in over ten years. When the Internal Revenue Service finally caught up with him, he owed more than $300,000 to the government. It filed a notice of federal tax lien against Henry, but finding the value of his assets (including the townhouse) insufficient to cover the debt, the Internal Revenue Service filed a notice of federal tax lien against Margo's townhouse as well. Under the Internal Revenue Code, Henry received notice of the lien, but Margo did not. Henry was entitled to an administrative hearing, but Margo was not. Henry petitioned for removal of the lien, but Margo could not. Henry could prosecute his appeal in the United States Tax Court, but Margo could not. Why this disparate treatment? According to the Internal Revenue Service (Service), Henry was a "taxpayer" entitled to administrative due process, but Margo, who hadn't incurred the debt in question, was not.

A federal tax lien can immobilize liened-upon property for over a decade before the Service finally seizes it by levy.[1] During this time, the property is useless for leverage—it cannot be effectively mortgaged or sold—even if it is someone's home or an integral part of

1. *See* I.R.C. § 6502(a)(1) (2000) (setting the limitation period for collection by levy at ten years after the assessment of the tax).

someone's business.[2] Because the effect of a federal tax lien can be devastating, the latter part of the last century witnessed a congressional effort to temper the Service's power.[3] The Internal Revenue Service Restructuring and Reform Act expanded statutorily created administrative due process rights afforded to taxpayers who are the targets of collection actions.[4]

In the eyes of the targeted taxpayers, the development was welcome. For others, the expansion made no difference. Not all collection actions target "taxpayers."[5] In some cases, like Margo's, the Service's collection efforts affect persons who hold property that, according to the Service, is beneficially owned by a delinquent taxpayer.[6] There are surprisingly few checks on the Service's seizure of such property, and although common sense suggests a different result, the person holding it is entitled to less due process than the proven tax cheat whose property it is alleged to be. Remedies exist, but they are different in both quantity and quality from those provided to actual tax debtors. Under current practice, an entire class of property holders, to whom we will refer as "alleged nominees," is denied administrative due process in collection actions solely because its members are not regarded as "taxpayers" by the Service.[7]

A *nominee*, according to the Service, is someone who receives, but does not possess beneficial ownership of, the property of a tax debtor.[8] Consider the easy example of a corrupt real estate developer. She has taken kickbacks from contractors, bribed city officials, and done deals in cash. When the Service discovers her less-than-truthful income tax reporting, can we expect her to sit idly while a revenue officer levies on her property? It hardly seems likely. She will transfer the property to someone else—perhaps a husband, brother, parent, or

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2. A properly filed tax lien is valid against third parties like purchasers and judgment creditors. *See id.* § 6323(a). This means that a third party will pay less for the property or demand the lien be paid so that clear title can be transferred. *See* United States v. Williams, 514 U.S. 527, 530 (1995) (describing how purchasers of the liened-upon property threatened suit against the seller).

3. *See* Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685; Omnibus Taxpayer Bill of Rights, Pub. L. No. 100-647, § 6227, 102 Stat. 3342, 3731 (1988).

4. *See* Internal Revenue Service Restructuring and Reform Act § 3401.

5. *See, e.g.*, I.R.S., U.S. DEP'T OF THE TREASURY, INTERNAL REVENUE MANUAL § 5.17.2.4.8.1 (2000) [hereinafter INTERNAL REVENUE MANUAL] (addressing collection from an alter ego rather than a "taxpayer"); *id.* § 5.17.2.4.8.2 (addressing tax collection from a nominee rather than a "taxpayer").

6. *Id.* § 5.17.2.4.8.2.

7. *Id.* § 5.12.2.6.4 (2007).

8. *Id.* § 5.17.2.4.8.2 (2000).

friend. If our villain retains control of the asset, and merely transfers its title, the unlucky (or perhaps complicit) property recipient will be labeled a nominee and will have virtually no access to administrative due process rights. But why should this person be entitled to due process rights at all? After all, it is not the nominee's property that is at stake. According to the Service, the property is beneficially owned by the transferor, and the Service's seizure of it will not affect the nominee's rights or hurt his bottom line.[9]

The foregoing argument presumes the alleged nominee's guilt—a presumption that would be unconstitutional in other circumstances—and its fallacy can be demonstrated by Margo and Henry's example. Regardless of who truly owns the property for federal tax purposes, Margo should be given effective means of challenging the Service's lien. Because the two are similarly situated, her means of challenge should be coextensive to that provided to Henry. Yet, under current law, the opposite is true.[10] An alleged nominee's means of recourse are limited in comparison to those available to the actual tax debtor.[11] What is more, the alleged nominee's means of recourse are equally limited when compared to other recipients of a tax debtor's property, such as recipients by fraudulent conveyance or corporate reorganization.[12]

It is difficult to reconcile the lack of due process provided to alleged nominees with the abundance of protections provided to other tax scofflaws. For procedural purposes, the two groups are indistinguishable: both are subject to a collection action in which the Service is cast in the role of debt collector.[13] Both, then, should be fully entitled to rely on existing statutory and administrative protections against unlawful collection. Or, if the two groups are to be treated differently, shouldn't those whose hands have been proven unclean receive the poorer fare?

We argue that alleged nominees should be entitled to the same modicum of protection that is afforded to taxpayers and the recipients of fraudulently conveyed property at the lien stage of tax collection

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9. *See id.* § 5.12.2.6.5(3) (noting that the use and benefit of the property to the taxpayer is one of the factors that will support a finding that a third party is a nominee).

10. *Id.* § 5.12.2.6.4 (2007).

11. *Id.*

12. *See, e.g.*, Al-Kim v. United States, 650 F.2d 944, 947 n.8 (9th Cir. 1979) (stating that nominees are not entitled to the protections afforded by I.R.C. § 6901 (2000)).

13. *See* INTERNAL REVENUE MANUAL, *supra* note 5, 5.17.2.4.8.2(3) ("The Service's NFTL [Notice of Federal Tax Lien] in a nominee situation is identical to the standard NFTL . . . .").

actions. The formal distinctions that separate these groups are distinctions without a difference. The critical inquiry, whether the Service may lien upon and later seize property in someone's possession without some sort of preseizure review, has the same import for each group. Therefore, preseizure due process rights afforded by Congress to one group should be afforded to the others. Conversely, if Congress denies one group such rights, it should deny the others those rights as well.

Part II of this Article describes the genesis and scope of the protections that are currently available to taxpayers through the Internal Revenue Code (Code). Those persons whose debt has spurred a tax collection action are afforded a panoply of preseizure rights. In particular, they are entitled to participate in an administrative hearing and appeals process that concludes with standing before the Tax Court.[14] According to the Service, the process is available only to taxpayers, not to alleged nominees.[15] Part III, therefore, describes the definition of *taxpayer* under current law and concludes that although the Service has applied the term very narrowly, the United States Supreme Court has construed it broadly.[16] When viewed in light of the Supreme Court's interpretation of "taxpayer," the Service's justification for disparate treatment of alleged nominees and tax debtors pales.[17]

Part IV describes the criteria used to categorize nominees. Although courts and the Service have iterated a multiple-factor test to determine nominee status, the test is nearly identical to that employed in the assessment of fraudulent conveyance.[18] Despite the strikingly similar composition of fraudulent conveyance and nominee theories, the recipients of a fraudulent conveyance are often entitled to the same rights and protections as the taxpayer, while alleged nominees are not. Part V then sets forth protections that are available to alleged nominees and explains why those protections are ineffective in comparison to the process provided to taxpayers and recipients of fraudulent conveyances. On the whole, the avenues open to alleged nominees are more time consuming, more expensive, and require a greater production of evidence. They are, as a result, less favorable.

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14. *See* I.R.C. § 6320 (West Supp. 2007); *id.* § 6330 (West, Westlaw through 2007 amendments) (outlining collection due process).

15. INTERNAL REVENUE MANUAL, *supra* note 5, § 5.12.2.6.4 (2007).

16. *See* United States v. Williams, 514 U.S. 527, 534 (1995) (refusing to construe narrowly the word *taxpayer*).

17. *See infra* Part III.

18. *See* I.R.S. Chief Couns. Adv. Mem. 2002-35-023, at 14-15 (June 28, 2002).

Part VI describes remedies that are available to taxpayers and the recipients of fraudulent conveyances but are not available to alleged nominees. It argues that the Service and courts provide no rational justification for the denial of such rights to alleged nominees.

Finally, Part VII concludes that Congress should provide equivalent due process protection to taxpayers, recipients of fraudulent conveyance, and alleged nominees. Each of these groups is subject to the same manner of collection action; therefore, each realizes the potential to be wrongfully deprived of a legitimate property interest. The Service's policy of inconsistent treatment places a disproportionate burden on alleged nominees that is plainly and simply unfair. Without resort to the preseizure remedies afforded other groups, alleged nominees are forced to contend with the potentially devastating effect of a federal tax lien in less desirable ways. As a result, the administrative decision to file such a lien may, for practical purposes, remain unreviewable for over a decade.[19] By affording the same rights to alleged nominees as are afforded to other groups, Congress could level the playing field while bringing a modicum of consistency to the collection statutes of the Code.

II. COLLECTION DUE PROCESS BASICS

In order to understand fully the disparity in the due process afforded to alleged nominees and that afforded to taxpayers and recipients of fraudulently conveyed property, it is necessary to examine the collection due process provisions and their history. Both the contents and provenance of these provisions suggest that they should be widely applicable to anyone affected by a collection action. The Service, however, does not agree with this assessment.[20]

A. *Internal Revenue Service Collection Actions: A History of Revision*

Although taxpayers are now entitled to extensive due process protection against unfounded Service collection actions, it was not always so. Prior to January 19, 1999, the date on which the Collection Due Process (CDP) provisions were enacted, the Service had nearly

19. *See* I.R.C. § 6502(a) (2000) (giving the Service ten years after tax assessment within which to levy the property, at which point the nominee can bring a wrongful levy action under I.R.C. § 7426(a)(1)).

20. *See* INTERNAL REVENUE MANUAL, *supra* note 5, § 5.12.2.6.4 (2007).

unlimited collection discretion.[21] Once the Service formally assessed a taxpayer's deficiency, it could move forward with its collection procedures virtually free from taxpayer interference.[22] The taxpayer had no right to a hearing at any point, and the Service had the power to seize and dispose of property before the taxpayer could challenge the validity of the assessment.[23] Therefore, taxpayers were limited to refund claims.[24]

Then, as now, the Service's collection action began in earnest with the attachment of a lien. Section 6321 of the Code automatically created a lien that arose against all of the taxpayer's property or rights to property.[25] Unlike today, there was no requirement in the Code that the Service notify the taxpayer when a Notice of Federal Tax Lien (NFTL) was filed against that taxpayer's property.[26] Next, if the Service wanted to seize the taxpayer's property, section 6331(d) required that it provide the taxpayer with a notice of its intent to levy thirty days before the levy took place.[27] However, there were no hearing rights attached to this requirement.[28] The Service had only to provide the taxpayer with a single notice of intent to levy, after which it could levy anything belonging to the taxpayer without providing further notice.[29]

Due process was further circumscribed by the Anti-Injunction Act and the Declaratory Judgment Act.[30] These two provisions, which barred suits and declaratory judgments restraining Service collections, worked together to prevent taxpayers from interfering with the collections process.[31] While such unfettered discretion was seen as

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21. *See* Marilyn E. Phelan, *A Summary of the Extensive Collection Powers of the Internal Revenue Service*, 9 VA. TAX REV. 405, 432-34 & n.108 (1990) (summarizing Service collection powers as of 1990 and as modified by the 1988 Taxpayer Bill of Rights).

22. *See id.* at 465-67. Under I.R.C. § 6161, the Service could grant the taxpayer an extension. Under I.R.C. § 6159(a), the Service could work out an installment agreement with the taxpayer.

23. Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 27-28 (2004).

24. *See id.* at 26-31.

25. I.R.C. § 6321 (2000).

26. *See* Phelan, *supra* note 21, at 436 (discussing federal tax liens).

27. I.R.C. § 6331(d)(1)-(2).

28. *Id.* § 6331 (West Supp. 2007).

29. *See id.*

30. *Id.* § 7421 (2000); 28 U.S.C. § 2201(a) (2000). For a discussion of how tax collection and adjudication have existed outside of the constitutional mainstream, see Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 HOUS. L. REV. 1145, 1158-88 (2004).

31. *See* Book, *supra* note 30, at 1153.

necessary lest the Service be hampered in its ability to collect from delinquent taxpayers, it also resulted in numerous complaints and horror stories.[32]

B. Legislative History of the Collection Due Process Provisions

In a prevailing atmosphere of widespread public discontent, the Senate Finance Committee held hearings in 1997 and 1998 to review Service practices and to consider restructuring the Service.[33] In his opening remarks, Senator William V. Roth, the chairperson, underscored taxpayer concerns:

> There is no doubt that the powers of the Internal Revenue Service are extraordinary. The IRS can seize property, paychecks, and even the residences of the people it serves. Businesses can be padlocked, sometimes causing hundreds of employees who are also taxpayers to be put out of work.
>
> In some instances, the first time a taxpayer is aware of any enforcement action by the IRS is when his or her bank calls to notify that funds have been frozen. The IRS can take these actions in many cases without giving the taxpayer notice or opportunity to be heard.[34]

In light of this and other testimony, Congress sought to place some external checks on the Service.[35]

The hearings were covered by the media and included testimony from a divorced mother,[36] a priest,[37] attorneys, and Service employees.[38] For example, a former Service attorney testified:

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32. *See Practices and Procedures of the Internal Revenue Service: Hearings Before the S. Comm. on Finance*, 105th Cong. 1-2 (1997) (opening statement of Sen. William V. Roth, Jr.) [hereinafter *Finance Comm. Hearings*].

33. *See* Ralph Vartabedian & Jonathan Peterson, *Clinton Signs Bill That Aims To Reform IRS*, L.A. TIMES, July 23, 1998, at A16. The Committee held hearings on practices and procedures of the Service on September 23-25, 1997. *Finance Comm. Hearings*, *supra* note 32, at i. It held hearings on Service restructuring on January 28-29 and February 5, 11, and 25, 1998. *IRS Restructuring: Hearings Before the S. Comm. on Finance*, 105th Cong. i (1998). Finally, it held hearings on Service oversight on April 28-30 and May 1, 1998. *IRS Oversight: Hearings Before the S. Comm. on Finance*, 105th Cong. i (1998). For a detailed discussion of the hearings, see Camp, *supra* note 23, at 78-127. This was not the first time that Congress sought to enhance taxpayer rights. The 1988 Taxpayer Bill of Rights added several taxpayer-friendly provisions to the Code. Omnibus Taxpayer Bill of Rights, Pub. L. No. 100-647, § 6227, 102 Stat. 3342, 3731 (1988). The most well-known of these resulted in the publication of "Your Rights as a Taxpayer." I.R.S. Publ'n 1 (rev. May 2005). The publication provided taxpayers with an informational statement and was included in correspondence to taxpayers. *Id.* at 1-2.

34. *Finance Comm. Hearings*, *supra* note 32, at 2 (opening statement of Sen. William V. Roth, Jr.).

35. *See id.*

36. *Id.* at 75-82 (statement of Katherine Lund Hicks).

> I knew one manager I ran across who really did not understand the distinction between a lien and a levy and basically said, well, lien, levy, whatever, which in some instances can cause problems.
>
> . . . .
>
> In addition to simple lack of knowledge, I also ran across revenue officers who understood the legal and procedural requirements, but they chose not to follow them, or they consciously bypassed some of these things.[39]

One after the other, witnesses shared stories of Service abuse, leaving the Service looking at best incompetent and, at worst, malicious.[40] Most of the allegations of widespread abuse were later shown to be false,[41] but the testimony nonetheless made an impact.[42]

> An agency of the U.S. Government allowed such sweeping authority as that granted to the IRS should be held to the highest standards of honesty and integrity. The IRS is not. Those of us subject to that authority should be guaranteed an accessible and effective remedy for its abuse. We are not. It is a disgrace to our Nation that an arm of our democratic government is allowed to behave as if it were an extension of a police state.

Id. at 82.

37. *Id.* at 85-86 (statement of Monsignor Lawrence Ballweg).

> For 8 months I lived in constant worry, if not fear, that the trust that my dear mother had established to help the poor would be penalized because of what I can only call the unprofessional, calloused, and indifferent behavior of IRS employees who are devious enough never to sign their names to any notice that they send out. The taxpayer is dealing with people who can do inestimable harm, and cannot even be identified.

Id. at 86.

38. *Id.* at 116-20 (statement of Lawrence G. Lilly); *id.* at 142-94 (statements of Witnesses Nos. 1-6).

> As of late, we seem to be auditing only poor people. The current IRS management does not believe anyone in this country can possibly live on less than $20,000 per year, insisting anyone below that level must be cheating by understating their true income.
>
> Currently, in a typical case assigned for audit there are no assets, no signs of wealth, no evidence that would support a suspicion of higher unreported income. So when the IRS does initiate and [sic] audit on these people, these individuals are already only one short step away from being on the street.

Id. at 121 (statement of Jennifer Long).

39. *Id.* at 109 (statement of Darren Larsen).

40. *See id.* at 23-32, 35-139, 142-253 (reporting testimony and statements at the Senate Committee on Finance Hearings by twenty-one public witnesses about their experiences with the Service as taxpayers or employees).

41. *See* Gen. Accounting Office, GAO/OSI-99-9R (1999), *reprinted in* TAX NOTES TODAY 80-13 (Apr. 25, 2000). The General Accounting Office Report concluded that a taxpayer abuse allegations could not be substantiated. *Id.*

42. For a discussion of the problems with the use of such anecdotal evidence, see Leandra Lederman, *Of Taxpayer Rights, Wrongs, and a Proposed Remedy*, 87 TAX NOTES 1133, 1135-36 (2000).

After the hearings, the acting Commissioner, Michael Dolan, apologized to taxpayers, saying that the hearings were "very painful."[43]

As a result of the hearings, the Senate Finance Committee adopted a CDP proposal that was unprecedented in its scope.[44] It would have required the Service, prior to filing an NFTL, to provide the taxpayer with thirty days to request a hearing.[45] At the hearing, the taxpayer would have been able to challenge the tax liability on any grounds.[46] If unsuccessful, the taxpayer would have then had a right to appeal to the Tax Court, and ultimately the Court of Appeals.[47] During this time, the Service would have been required to suspend its collection actions.[48]

President Clinton's administration opposed the proposed CDP provisions:

> The proposed process would permit the non-compliant taxpayer to benefit at the expense of the vast majority of taxpayers who report and pay their taxes timely. In essence, this legislation would give any taxpayer a unilateral right to enjoin collection of taxes simply by taking an appeal to the Office of Appeals and then to the Tax Court .... [The protections] might dramatically affect the ability of the IRS to collect taxes ....[49]

Congress accordingly amended and passed the CDP proposal, and President Clinton signed the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA) on July 22.[50] The RRA reorganized the Service and targeted abuses that had come to light during the hearings.[51]

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43. Albert B. Crenshaw, *IRS Tightens Its Procedures for Seizing Property*, WASH. POST, Dec. 3, 1997, at A18. He also said, "It distresses me a great deal to see the mistakes we have made and their impact." *Id.*

44. *See* S. REP. NO. 105-174, at 67-68 (1998).

45. *Id.* at 68. There were jeopardy procedures the Service could utilize if it believed that notice would undermine its collection efforts. *Id.* at 69.

46. *Id.* at 68.

47. *Id.* at 68-69.

48. *Id.*

49. Letter from L. Anthony Sutin, Acting Assistant Attorney Gen., Justice Dep't, to The Honorable William V. Roth, Jr., Chairman, Comm. on Fin., U.S. Senate, and The Honorable Bill Archer, Chairman, Comm. on Ways and Means, House of Representatives ¶¶ 20-21 (June 8, 1998), *reprinted in* L. Anthony Sutin, *Justice Letter Raising Constitutional Concerns in IRS Reform*, TAX NEWS TODAY 112-41 (June 11, 1998).

50. Pub. L. No. 105-206, 112 Stat. 685; *see* Vartabedian & Peterson, *supra* note 33 ("'The bill will give the American people an IRS they deserve,' said Clinton, who originally was skeptical about the proposals but became a convert following sensational Senate hearings on IRS misdeeds.").

51. *See* Internal Revenue Service Restructuring and Reform Act § 1001(a), 112 Stat. at 689 (codified at I.R.C. § 7801 (2000 & Supp. IV 2004)).

C. Description of the Taxpayer Protections Provided

RRA section 3401 added sections 6320 and 6330 to the Code.[52] These CDP provisions provide taxpayers with hearing rights with regard to liens and levies, respectively.[53] While the CDP provisions, as enacted, do not afford the taxpayer with as many rights as the Committee proposal did, they nonetheless allow the taxpayer to administratively dispute Service collections, a luxury not afforded to alleged nominees.[54]

1. Section 6320

Section 6320 of the Code governs the lien stage of collection actions.[55] It requires the Service to provide written notification to the taxpayer not more than five business days after filing an NFTL.[56] The notice must inform the taxpayer of the right to request an administrative hearing.[57] It must be given in person, left at the taxpayer's dwelling or usual place of business, or sent by certified or registered mail to the taxpayer's last known address.[58] If the notice is not properly sent, the thirty-day period does not begin, and the taxpayer must be given another notice.[59] The Service will only give notice to the delinquent taxpayer and not to any person holding property of the taxpayer, such as an alleged nominee.[60] The notice must include the amount of unpaid tax, the taxpayer's right to a hearing, the administrative appeals available, and the statutory

52. *Id.* § 3401, 112 Stat. at 746 (codified at I.R.C. § 6320 (West Supp. 2007); *id.* § 6330 (West, Westlaw through 2007 amendments)).

53. *Id.* For a detailed analysis of the CDP provisions, see Leslie Book, *The New Collection Due Process Taxpayer Rights*, 86 TAX NOTES 1127, 1135-52 (2000).

54. *See* Internal Revenue Service Restructuring and Reform Act, § 3401, 112 Stat. at 746. For discussion and critique of the CDP provisions, see Danshera Cords, *How Much Process Is Due? I.R.C. Sections 6320 and 6330 Collection Due Process Hearings*, 29 VT. L. REV. 51, 59-98 (2004).

55. I.R.C. § 6320 (West Supp. 2007).

56. *Id.* § 6320(a)(1)(2) (2000). "In practice, this notification is given by Letter 3172—Notice of Federal Tax Lien Filing and Your Right to a Hearing under I.R.C. § 6320." *Collection Due Process Cases*, I.R.S. Notice CC-2006-019, at 8 (Aug. 18, 2006).

57. I.R.C. § 6320(a)(3)(B).

58. *Id.* § 6320(a)(2).

59. Treas. Reg. § 301.6320-1(a)(2), Q&A-A12 (as amended in 2007). However actual receipt is not a prerequisite to the validity of the CDP notice. *See id.*

60. *See id.* § 301.6320-1(a)(2), Q&A-A1.

provisions and procedures relating to the release of liens on properties.[61]

The CDP hearing is held by the Internal Revenue Office of Appeals (Appeals Office) by an impartial officer who has had no prior involvement with the matter.[62] The taxpayer is allowed one hearing per tax period.[63] Whenever possible, this hearing is consolidated with the section 6330 hearing, which is described below.[64] There is no requirement that the hearing be face-to-face, but generally, nonfrivolous requests for face-to-face hearings are granted.[65] The hearings are held at the Appeals Office closest to the taxpayer's residence.[66] They are informal, and the hearing procedures required by the Administrative Procedure Act do not apply.[67]

At the hearing, the taxpayer may raise any issue relating to the unpaid tax, including spousal defenses, challenges to filing of the NFTL, and offers for collection alternatives.[68] However, the taxpayer can only raise challenges to the existence or the amount of the tax liability if the taxpayer did not receive a notice of deficiency for the underlying tax or never had an opportunity to dispute the tax liability.[69] The taxpayer is expected to provide all relevant information requested by the Appeals Office for its consideration of the issues at the hearing.[70]

After the hearing, the Appeals Office is required to issue a Notice of Determination.[71] The taxpayer may appeal the determination to the Tax Court within thirty days after this notice is issued.[72] However, the

61. I.R.C. § 6320(a)(3). In practice, the Service provides the taxpayer with Form 12153—Request for a Due Process Hearing. Treas. Reg. § 301.6320-1(a)(2), Q&A-A9. However, taxpayers are not required to use this form. *See id.*

62. I.R.C. § 6320(b) (West. Supp. 2007). For an overview of the CDP hearing, see David B. Robison, *The Collection Due Process Hearing—An Insider's Perspective*, 104 J. TAX'N 225, 225-28 (2006).

63. I.R.C. § 6320(b)(2) (2000).

64. *Id.* § 6320(b)(3)-(4).

65. Treas. Reg. § 301.6320-1(d)(2), Q&A-D7.

66. *Id.*

67. *Id.* § 301.6320-1(d)(2), Q&A-D6; 5 U.S.C. §§ 551-557 (2000).

68. Treas. Reg. § 301.6320-1(e)(1). Offers for collection alternatives include an offer in compromise, the posting of a bond, substitution of other assets, and a subordination of the NFTL. *Id.* § 301.6320-1(e)(3), Q&A-E6.

69. *Id.* § 301.6320-1(e)(3), Q&A-E2. This means a receipt in time to petition the Tax Court for a redetermination of the deficiency. *Id.* This is more restrictive than the Senate Finance Committee proposal, which would have allowed the taxpayer to dispute the underlying liability on any grounds. *See* S. REP. NO. 105-174, at 68 (1998).

70. Treas. Reg. § 301.6320-1(e)(1).

71. *Id.* § 301.6320-1(f)(1).

72. *Id.*

taxpayer may only ask the Tax Court to consider issues that were properly raised at the CDP hearing.[73]

2. Section 6330

Under section 6330 of the Code, the Service is required to provide written notification of its intent to levy any property or right to property of any person prior to the levy.[74] In general, the provisions in section 6330 mirror those in section 6320. The content of the notice and the method for its delivery are similar to that described in section 6320.[75] In addition, the notice must detail the action proposed by the Service, including provisions and procedures relating to the levy and sale of property, the availability of administrative appeals, a description of alternatives that could prevent the levy, and provisions and procedures regarding the redemption of property and the release of liens on the property.[76]

In addition, section 6330 provides a list of factors that the Appeals Office will consider when determining the propriety of a levy.[77] These include whether the Service met the requirements of applicable law or administrative procedures, any issues appropriately raised by the taxpayer, spousal defenses, challenges to the proposed collection, any offers for collection alternatives, and whether the collection action sufficiently balances the need for efficient collection and the concern that any collection action be no more intrusive than necessary.[78]

During the hearing and appeals period, levy actions are usually suspended.[79] However, the Tax Court may permit the levy action if the underlying tax liability is not at issue and the Service shows good cause not to suspend.[80] Finally, if the taxpayer does not prevail in the section 6330 appeals process, he can file a petition for Tax Court review.[81]

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73. *Id.* § 301.6320-1(f)(2), Q&A-F3.

74. I.R.C. § 6330(a)(1) (2000). Except for jeopardy levies or levies on state income, tax refunds are excepted from the requirements in section 6330. *Id.* § 6330(f) (West Supp. 2007).

75. *Id.* § 6330(a)(2)-(3) (2000).

76. *Id.* § 6330(a)(3)(C).

77. *Id.* § 6330(c)(3) (West Supp. 2007).

78. *See* Treas. Reg. § 301.6330-1(e)(3), Q&A-E1 (as amended in 2007) (listing factors to be considered).

79. I.R.C. § 6330(e)(1) (2000).

80. *Id.* § 6330(e)(2).

81. *Id.* § 6330(d)(1) (West Supp. 2007).

III. COLLECTION DUE PROCESS PROTECTIONS AGAINST LIENS ARE ONLY AVAILABLE TO THE "TAXPAYER"

Despite their beneficent purpose and sweeping scope, sections 6320 and 6330 are not available to all persons affected by a collection action.[82] Section 6320 applies only to "the person described in section 6321,"[83] whom the regulations refer to as "the taxpayer."[84] Section 6321, in turn, applies to "any person liable to pay any tax [who] neglects or refuses to pay the same after demand."[85] Section 6330 is textually broader—it applies to "any person" whose property the Service intends to levy upon—but the regulations specify that it applies only to a person described in section 6331.[86] This person, too, is described by the regulations as "the taxpayer."[87] The regulations also specify that neither section 6320 nor section 6330 is applicable to alleged nominees because alleged nominees are not taxpayers.[88] Furthermore, other CDP sections, such as one that permits the Service to withdraw a lien in some circumstances, apply only to the "taxpayer."[89] Accordingly, when a person who is the subject of a Service collection action is not also liable for the underlying tax debt, the panoply of ordinarily available administrative and judicial remedies is severely limited. The scope of who may be considered a taxpayer is thus a critical inquiry.

In its natural environment, the definition of *taxpayer* is amorphous and can change according to the dictates of law or equity.[90] When used in the Code, and "where not otherwise distinctly expressed or manifestly incompatible with the intent thereof," the word

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82. *See* Treas. Reg. § 301.6320-1(a)(2), Q&A-A7; *id.* § 301.6330-1(a)(3), Q&A-A2.

83. I.R.C. § 6320(a)(1); *see also id.* § 6321(a)(1) (designating the individual to whom section 6320 will apply).

84. Treas. Reg. § 301.6320-1(a)(2), Q&A-A1.

85. I.R.C. § 6321.

86. *Id.* § 6330 (West, Westlaw through 2007 amendments); Treas. Reg. § 301.6330-1(a)(3), Q&A-A1.

87. Treas. Reg. § 301.6330-1(a)(3), Q&A-A1.

88. *See id.* § 301.6320-1(a)(2), Q&A-A7; *id.* § 301.6330-1(a)(3), Q&A-A2. In a question and answer format, the section 6320 regulation states, "Will the IRS give notification to a known nominee of, or a person holding property of, the taxpayer . . . ?" *Id.* § 301.6320-1(a)(2), Q&A-A7. The answer is, "No. Such person is not the person described in section 6321 and, therefore, is not entitled to notice. . . ." *Id.* The section 6330 regulation is nearly identical. *See id.* § 301.633001(a)(3), Q&A-A2.

89. I.R.C. § 6323(j) (2000).

90. *Compare id.* § 7701(a)(14) (defining a taxpayer as a person who is subject to an internal revenue tax) *with* Treas. Reg. § 301.6320(a)(2), Q&A-A7 (stating that section 6321 does not describe nominees).

"'taxpayer' means any person subject to any internal revenue tax."[91] This definition, if interpreted literally, is all-encompassing and should, in theory, extend the spirit of collection due process to a person who pays *any* tax, whether or not the tax at issue. As discussed below, the Service has taken a contrary position in specific instances, and other definitions of the word may be inferred from the context of the Code and from case law in specific instances.[92] The distinction is important because, throughout the Regulations, a "taxpayer" or "the person" liable for a tax can protect her rights during collection, whereas a person not considered to be a taxpayer may be denied the same opportunity.[93]

The Service, for purposes of the CDP provisions, considers the "taxpayer" to be "the person" "liable to pay any tax" and who "neglects or refuses to pay" the tax on demand.[94] Such a person is entitled to collection due process rights.[95] Conversely, the Service views nominees, who are not liable for the underlying debt asserted against them, as a class of individuals not afforded collection due process rights.[96] The Service's narrow construction is unwarranted. Although the word *taxpayer* is traditionally thought of as the person who owes a tax or the person against whom a tax is assessed, its definition has been expanded through judicial interpretation.[97] Aside from the person who owes a particular tax, a taxpayer may also be, among other things, a person who pays a tax liability of another, a transferee under section 6901, or particular individuals within a partnership or corporation.[98] The following describes instances in which a "taxpayer" or a "person" has been more than what meets the eye.

91. I.R.C. § 7701(a)(14).

92. *See, e.g.*, Treas. Reg. § 301.6320-1(a)(2), Q&A-A2 ("The person described in section 6321 is the person liable to pay the tax due after notice and demand who refuses or neglects to pay the tax due (hereinafter, referred to as the *taxpayer*)." (emphasis added)).

93. *See, e.g.*, *id.* § 301.6320-1(b)(2), Q&A-B5 (describing that only the section 6321 taxpayer is entitled to a CDP hearing and that while a nominee may be entitled to another type of administrative hearing, resulting decisions would not be subject to judicial review).

94. *See* I.R.C. § 6320 (West Supp. 2007); *id.* § 6321 (2000); Treas. Reg. § 301.6320-1(a)(2), Q&A-A1. Conversely, the regulations provide that a nominee "is not the person described in section 6321." *Id.* § 301.6320-1(a)(2), Q&A-A7.

95. I.R.C. § 6320 (West Supp. 2007); *id.* § 6330 (West, Westlaw through 2007 amendments).

96. *See* Treas. Reg. § 301.6320-1(a)(2), Q&A-A7; *id.* § 301.6330-1(a)(3), Q&A-A2.

97. *See* United States v. Williams, 514 U.S. 527, 535 (1995) (rejecting the government's interpretation of the definition of *taxpayer* as excluding those against whom no tax has been assessed).

98. *See id.*; Rev. Proc. 2005-34, 2005-1 C.B. 1233-35.

A. *Revenue Procedure 2005-34*

Revenue Procedure 2005-34 highlights the interplay between Congress's use of "person" and its use of "taxpayer."[99] The Revenue Procedure describes administrative appeals of proposed trust fund recovery penalty assessments.[100] As it notes, section 6672(a) imposes a penalty on "any person" required to collect the underlying tax who willfully fails to do so.[101] For purposes of the relevant Code chapter, a "person" is defined as "an officer or employee of a corporation, or a member or employee of a partnership, who . . . is under a duty to perform" the obligation of the organization.[102] As is generally the case with penalties imposed by the Code, section 6672 requires the Service to give notice to the affected party.[103] Section 6672's notice provision, however, does not apply specifically to the statutory "person."[104] Rather, it applies to "any taxpayer" against whom the Service intends to assess the penalty.[105] The Revenue Procedure supposes that this discrepancy in language exists because the penalty may ultimately be asserted against people who, ironically, are not "persons" under the statute.[106]

Revenue Procedure 2005-34 provides the beginning of a framework in which to consider the use of the words *person* and *taxpayer* in the collections arena.[107] For purposes of section 6672, the Service has taken the position that people against whom it intends to assess a penalty, but who ultimately may not be subject to the penalty because they are not "persons," should be afforded notice despite their questionable personhood.[108] In other words, the Service views the potential application of section 6672 as sufficient to justify the provision of some small measure of due process notice.[109] By espousing this interpretation of the statute, the Service has said, in not so many words, that a "taxpayer" can be someone who is *not* liable for the particular tax at issue, a position that is the polar opposite of its stance on CDP matters.

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99. Rev. Proc. 2005-34, *supra* note 98, at 1234.
100. *Id.*
101. *Id.*
102. I.R.C. § 6671(b) (2000).
103. *Id.* § 6672(b).
104. Rev. Proc. 2005-34, *supra* note 98, at 1233-35.
105. *Id.* at 1234 (citing I.R.C. § 6672(b)).
106. *Id.*
107. *Id.* at 1233-35.
108. *See id.* at 1234.
109. *See id.*

B. Views of the Supreme Court

Like the Service, courts have given various interpretations to the word *taxpayer*.[110] There are instances where an individual seeks to be considered a taxpayer and is denied that label, or in the alternative, where a person seeks not to be considered a taxpayer owing a particular tax.[111] For example, those requesting due process may seek to be classified as taxpayers while those attempting to avoid liability altogether may try to shun the label. For alleged nominees, who are in the former category, the most important court case to date has been the Supreme Court's decision in *United States v. Williams*.

1. The *Williams* Decision

The *Williams* decision held that a plaintiff who paid the taxes of another could file a suit for refund because she was, quite literally, a taxpayer.[112] Although common sense recommends such a holding, prior to *Williams*, the Service denied the ability of a third party to file such a claim on the premise that the third party had not made an overpayment of his or her *own* taxes.[113] Under section 6402(a) of the Code, the Service may only issue a refund "[i]n the case of any overpayment."[114] Like a host of other terms used in the collections statutes, "overpayment" is not clearly defined by the Code.[115] Section 6511, however, specifies that the relevant statute of limitations applies to "an overpayment of any tax" for which "the taxpayer is required to file a return."[116] Before the Court's decision in *Williams*, the Service took the position that an alleged nominee who paid someone else's liability was not a taxpayer claiming a refund of tax for which she was

110. *Compare* United States v. Williams, 514 U.S. 527, 535 (1995) (holding that the definition of taxpayer included the plaintiff who had paid the tax liability of another person), *with* United States v. Galletti, 541 U.S. 114, 120-21 (2004) (holding that although partners could be considered taxpayers, they were not the *relevant* taxpayers because the employment taxes were assessed against the partnership).

111. *See* Busse v. United States, 542 F.2d 421, 425 (7th Cir. 1976) (holding that the United States had not waived sovereign immunity to suits by nontaxpayers with the implication that the plaintiff, whose claim was dismissed, was not a taxpayer).

112. 514 U.S. at 535-36.

113. *See* Snodgrass v. United States, 834 F.2d 537, 539 (5th Cir. 1987), *abrogated by* United States v. Williams, 514 U.S. 527 (1995) (holding that 28 U.S.C. § 1346(a) "permits only the taxpayer who has paid a tax" to sue the United States for a refund); *Busse*, 542 F.2d at 425 (holding that the waiver of sovereign immunity did not extend to a refund suit by a plaintiff who paid the tax of another).

114. I.R.C. § 6402(a) (2000).

115. *See* DAVID M. RICHARDSON ET AL., CIVIL TAX PROCEDURE 219 (2005) ("Neither the Code nor the Regulations contains a comprehensive definition of an overpayment.").

116. I.R.C. § 6511(a).

required to file a return.[117] Accordingly, under section 6511(a), an alleged nominee could not file a claim for a refund or file a subsequent refund suit.

Circuit courts disagreed about the appropriate result, and some sided with the Service.[118] For instance, in 1976, the United States Court of Appeals for the Seventh Circuit upheld the dismissal of a third party's refund suit regarding transferee liability on the ground that the petitioner was not "the taxpayer" entitled to sue for a refund.[119] The court explained that 28 U.S.C. § 1346(a)(1),[120] which gives district courts original jurisdiction over any civil action against the United States for recovery of internal revenue tax, is a waiver of sovereign immunity that must be construed narrowly; therefore, it did not waive sovereign immunity with respect to suits by "non-taxpayers."[121] The court further held that the existence of other remedies—a suit to quiet title under 28 U.S.C. § 2410 and a wrongful levy action under section 7426—provided additional evidence that refund suit jurisdiction was inappropriate for a third-party payor.[122]

In 1987, the United States Court of Appeals for the Fifth Circuit addressed a similar situation in *Snodgrass v. United States*.[123] It affirmed the dismissal of a refund suit by the wife of a taxpayer even though the Service collected her portion of proceeds from the sale of community property in satisfaction of a penalty assessed against her husband.[124] Like the Seventh Circuit, the court focused on a narrow construction of the waiver of sovereign immunity and held that only a "taxpayer" may bring a refund suit.[125] Because Mrs. Snodgrass was not

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117. *See Snodgrass*, 834 F.2d at 539-40.

118. *See Busse*, 542 F.2d at 424 (discussing the "conflict in the authorities on the question of whether a refund suit can be filed by a person who pays a third party's taxes").

119. *Id.* at 425.

120. 28 U.S.C. § 1346(a)(1) (2000) provides:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of
>
> (1) any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

121. *Busse*, 542 F.2d at 425.

122. *Id.*

123. 834 F.2d 537, 539 (5th Cir. 1987).

124. *Id.* at 538.

125. *Id.* at 539-40. The court added:

> We recognize that inequity may result from our dismissing this action and consigning the Snodgrasses to another remedy against the government, or perhaps

the "taxpayer," the court held that she had no standing to bring a refund action.[126] The Fifth Circuit added, "We have recently noted that th[e] 'wrongful levy' provision is now the only means by which third parties may challenge the tax-collection activities of the IRS."[127]

A more recent decision of the United States Court of Appeals for the Fourth Circuit, however, reached a different conclusion.[128] In 1990, *Martin v. United States* held that any person against whom a tax is erroneously assessed or collected has standing to bring a refund action.[129] In *Martin*, the Service assessed taxes against a husband and then filed a tax lien against him.[130] In a divorce settlement, the wife received title to a residence, which she later sold.[131] The Service erroneously asserted the husband's tax lien upon sale of the property, and the wife's attorney paid the required amount on her behalf so that she could convey clear title.[132] Although the Service admitted that the lien had not properly attached to the wife's interest, it refused to grant a refund to her, arguing that it had no authority to give a refund to a third-party payor.[133] The Fourth Circuit applied a plain meaning interpretation of § 1346(a)(1) and held that *any* person from whom a tax is erroneously assessed or collected has standing to bring a refund action.[134]

When presented with the *Williams* case, the Supreme Court agreed with the Fourth Circuit.[135] With *Williams*, the Court expanded the boundary of "taxpayer" in tantalizing ways.[136] Based on the facts described below, the Court was called upon to determine whether Ms.

> no remedy at all. However, as the Second Circuit has summed up, "[T]he spirit proper to judicial consideration of a waiver of sovereign immunity is not one of generosity and broad interpretation." Democratic sovereigns, like kings, may do wrongs, but in the absence of their consent, the courts of their nations lack jurisdiction to remedy the harms they have wrought.

Id. at 540 (quoting Phillips v. United States, 346 F.2d 999, 1000 (2d Cir. 1965)).

126. *Id.* at 539.

127. *Id.* (citing Interfirst Bank Dallas, N.A. v. United States, 769 F.2d 299, 307 n.12 (5th Cir. 1985)).

128. Martin v. United States, 895 F.2d 992, 994 (4th Cir. 1990).

129. *Id.*

130. *Id.* at 992.

131. *Id.*

132. *Id.* at 992-93.

133. *Id.* at 993.

134. *Id.* at 994.

135. United States v. Williams, 514 U.S. 527, 529 (1995).

136. *See id.*

Williams was authorized to sue for a refund under 28 U.S.C. § 1346.[137] The Court held that she was.[138]

Ms. Williams was given a house and other property by her husband, Mr. Rabin, in anticipation of divorce, and as consideration for the transfers, she assumed three of his liabilities totaling almost $650,000.[139] Ms. Williams took title to the house and other property without notice of any tax liens against it.[140] Ms. Williams later entered into a contract to sell the house, and one week prior to the closing, the Service gave her actual notice of a tax lien against it arising from liabilities of her husband.[141] The Service asserted that the liens had attached to the husband's interest in the house prior to its transfer.[142] Under threat of suit by the buyer and under protest to the Service, Ms. Williams paid $41,937 to have the liens removed so she could convey clear title.[143]

Ms. Williams filed an administrative claim for refund that was subsequently denied, and then she filed suit in the district court.[144] The Service argued that the district court lacked jurisdiction over Ms. Williams' claim because "she lacked standing to seek a refund under § 1346(a)(1)," which the Service felt only permitted actions by the "assessed party."[145] The crux of the Service's argument was that under section 7422 of the Code, Ms. Williams could not bring a refund action without first exhausting her administrative remedies, that under section 6511, only a "taxpayer" can exhaust, and that under section 7701(a)(14), Ms. Williams was not a taxpayer.[146]

The Court looked at the language and history of § 1346(a)(1) and noted that it was similar to the common law assumpsit actions formerly brought against tax collectors.[147] It observed that "[a]ssumpsit afforded a remedy to those who, like Williams, had paid money they did not owe—typically as a result of fraud, duress, or mistake."[148] The Court therefore felt that the Service's limitation of

137. *Id.* at 531.
138. *Id.*
139. *Id.* at 530.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 530-31.
146. *Id.* at 532-33.
147. *Id.* at 532.
148. *Id.*

relief was inconsistent with the statute.[149] The Court also reasoned that the statute authorized refunds to parties other than the one assessed.[150] It found that the section 7701(a)(14) definition of *taxpayer* was broad enough to encompass Ms. Williams and that the word "'taxpayer' . . . cannot bear the weight the [Service] puts on it."[151] It noted that by placing a lien on Williams's home and by "accepting her tax payment under protest, the [Service] surely subjected Williams to a tax, even though she was not the assessed party."[152] The Court concluded, "The [Service]'s strained reading of § 1346(a)(1), we note, would leave people in Williams' position without a remedy."[153]

Subsequent court decisions have not wholeheartedly adopted the Supreme Court's broad use of "taxpayer," and some courts have limited *Williams* to the narrow situation in which a taxpayer has paid under protest the tax underlying the lien.[154] Nonetheless, the *Williams* case leaves open the possibility that placement of a tax lien on property not belonging to the tax debtor could, in some instances, be a sufficient deprivation of rights to constitute taxation for purposes of the section 7701(a)(14) definition of "taxpayer" and for purposes of the section 6321 lien provision that triggers access to the collections due process protections contained in section 6320.

2. *United States v. Galletti*

In *United States v. Galletti*, the Court once again tackled the section 7701(a)(14) definition of *taxpayer*.[155] The question presented—whether the Service was required to assess unpaid employment taxes against both a partnership and the individual partners under sections 6501(a) and 6502(a)—depended upon whether the partners were relevant "taxpayers."[156]

The facts of the case were as follows. The Service properly assessed a tax liability against the Marina Cabrillo Company for failure to pay federal employment taxes, but the debt was never

149. *Id.*
150. *Id.* at 534.
151. *Id.*
152. *Id.* at 535.
153. *Id.* at 536.
154. *See, e.g.*, Dahn v. United States, 127 F.3d 1249, 1253-54 (10th Cir. 1997) (holding that where the target of a collection action makes no effort to pay but is merely a passive participant, *Williams* does not apply).
155. 541 U.S. 114, 118 (2004).
156. *Id.* at 116.

satisfied.[157] The general partners, the Gallettis and Briguglios, later filed for bankruptcy, and the Service filed a proof of claim seeking the unpaid employment taxes of the partnership.[158]

The partners argued that the assessment against the partnership was ineffective against the partners themselves.[159] The Service did not assess the partners within the three-year period described in the statute of limitations; therefore, the partners maintained that the Service could no longer collect against them.[160] The partners argued that they should have been named in the assessment because "they are 'the [relevant] taxpayer[s]' under § 6203 and because they are jointly and severally liable for the tax debts of the Partnership."[161]

The Court disagreed with the partners' position.[162] It determined that section 6501(a) merely requires "that [a tax] is assessed, not the taxpayer."[163] Accordingly, the Court held that once the tax is assessed against the correct taxpayer, the statute does not obligate the Service to reassess individuals or entities that would ultimately be liable for the tax under state law.[164] It added that if the question of taxpayer identity were relevant to the outcome of the case, it mattered little to the result.[165] The partnership was the primary obligor of the tax debt.[166] Even though the partners would ultimately pay the tax, their liability was a function of state entity law, not of the Code.[167] Looking to *Williams*, the Court explained that it was required to interpret "'taxpayer' . . . with reference to the underlying liability."[168] Therefore, the partners were not taxpayers with regard to the employment tax, which federal law imposed solely on the partnership.[169]

At first blush, *Galletti* seems to cut against affording due process rights to alleged nominees because the "underlying liability" upon which a nominee lien is premised is not that of the nominee.[170] This

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157. *Id.* at 117.
158. *Id.*
159. *Id.*
160. *Id.* at 117-18.
161. *Id.* at 119-20 (alteration in original).
162. *Id.* at 120-21.
163. *Id.* at 123.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 121.
168. *Id.* at 121 n.3.
169. *See id.* at 121.
170. INTERNAL REVENUE MANUAL, *supra* note 5, § 5.17.2.4.8.2(1) (defining a nominee lien as one that "extends to property 'actually' owned by the taxpayer even though a third party holds 'legal' title to the property as nominee").

interpretation is too narrow. The Supreme Court's distinction between the liability of the *Galletti* partners and that of their partnership was one of source.[171] The source of the partnership's debt was a provision of the Code, but the source of the partners' debts was a provision of California state law.[172] In other words, the Supreme Court's consideration of the underlying liability merely amounted to a determination of whether the debt in question was imposed upon the partners by federal law.[173] In *Galletti*, California law provided that general partners were liable for the debts of their partnership.[174] No similar provision exists in the nominee context.

The Supreme Court addressed the interaction of federal and state law in nominee collection actions in *Drye v. United States*.[175] In that case, the plaintiff was a tax debtor who inherited and then disclaimed his mother's estate.[176] As a result of the disclaimer, the estate passed to the plaintiff's daughter, who transferred the property to a family trust of which the plaintiff was a beneficiary.[177] The Service recorded a nominee lien against the trust and levied against accounts held in the trust's name.[178] The plaintiff argued that the Service's levy was wrongful because, under state law, he was not the owner of the property held by the trust.[179] Conversely, the Service argued that federal law governed its ability to levy property.[180] In a decision that split the proverbial baby, the Court held: "We look initially to state law to determine what rights the taxpayer has in the property the [Service] seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of the federal tax lien legislation."[181]

In light of *Drye*, *Galletti* should not prevent a court from concluding, under *Williams*, that a nominee may be entitled to a taxpayer's due process rights under the Code. Although *Drye* delineates a role for state law in nominee collection proceedings, that role is merely to determine the alleged nominee's rights in property.[182]

171. *Galletti*, 541 U.S. at 121.
172. *Id.*
173. *Id.* at 123.
174. *Id.*
175. 528 U.S. 49, 52 (1999).
176. *Id.* at 53.
177. *Id.* at 53-54. An interesting trick, to be sure.
178. *Id.* at 54.
179. *Id.* at 57.
180. *Id.*
181. *Id.* at 58.
182. *Id.*

In contrast, the state law at issue in *Galletti* actually imposed liability.[183] Whereas the source of the liability in *Galletti* was a state law, which prevented the partners from being federal taxpayers, the source of liability in nominee lien cases is wholly federal.[184] Consequently, *Galletti* should not prevent the provision of due process to alleged nominees under sections 6320 and 6330. Nor should it prevent them from being classified as "taxpayers" for purposes of those sections in light of the Supreme Court's decision in *Williams*.

The *Williams* case's interpretation of the word *taxpayer* could be read broadly to encompass alleged nominees.[185] Although *Williams* dealt not with a lien, but with the seizure of property by levy, a lien is also a form of seizure. Liened-upon property cannot be effectively mortgaged or alienated.[186] Therefore, the existence of a lien makes improvement of the property impractical. Furthermore, a lien is merely the prelude to a complete deprivation.[187] An alleged nominee, then, like a delinquent taxpayer, has not yet paid, but is expected to pay taxes.[188] Under the *Williams* formulation, an alleged nominee who was innocent would unquestionably become a taxpayer when his or her property was levied.[189] The result should be the same at the lien stage. While a lien is in place, the tax debtor and the alleged nominee both suffer deprivation as a result of the Service's use of their property as a surety. If the deprivation suffered by the alleged nominee as a result of the lien is the same as that suffered by the tax debtor, it follows under the reasoning employed by *Williams* that the alleged nominee is no less a taxpayer than the tax debtor.

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183. United States v. Galletti, 541 U.S. 114, 121 (2004).

184. *Id.*; *Drye*, 528 U.S. at 57 ("[T]he Code and . . . case law place under federal, not state, control the ultimate issue whether a taxpayer has a beneficial interest in any property subject to levy . . . .").

185. *See* United States v. Williams, 514 U.S. 527, 540 (1995) (holding that a person can sue the Service for a refund where she paid a tax erroneously levied against her property).

186. A lien acts as an encumbrance on the property. *See Guidelines for Notices of Federal Tax Liens and Centralized Lien Processing*, I.R.S. Publ'n 1468 (Aug. 2006) (defining a federal tax lien as a claim against the property of the taxpayer, which may later be enforced); Jack F. Williams, *Rethinking Bankruptcy and Tax Policy*, 3 AM. BANKR. INST. L. REV. 153, 191 (1995) (stating that a federal tax lien encumbers the property of a taxpayer). An encumbrance may make property difficult to sell. *See* BLACK'S LAW DICTIONARY 568 (8th ed. 2004) (defining an encumbrance as "[a] claim or liability that is attached to property . . . and that may lessen its value, such as a lien or mortgage").

187. *See* I.R.C. § 6331(a)-(b) (2000) (authorizing the Service to levy any property on which a lien has been placed, and defining *levy* as the "seizure by any means" of the taxpayer's property).

188. *See* INTERNAL REVENUE MANUAL, *supra* note 5, § 5.17.2.4.8.2(1).

189. *See Williams*, 514 U.S. at 535.

IV. NOMINEE BASICS

A. *Who Is a Nominee?*

Despite *Williams'* broad definition of taxpayer, the Service continues to differentiate taxpayers from alleged nominees.[190] The two groups are entitled to different sets of rights: taxpayers receive a full set of rights and nominees receive almost none.[191] This raises an important question: who is a nominee?

A court faced with an alleged nominee "attempts to discern whether a taxpayer has engaged in a sort of legal fiction, for federal tax purposes, by placing legal title to property in the hands of another while, in actuality, retaining all or some of the benefits of being the true owner."[192] The Code makes no mention of nominee liens or nominee theory, and the Treasury Regulations advert to the idea only briefly.[193] A second group of transferees, referred to as "alter egos," face the same dilemma.[194] An alter ego is generally an entity that is separate in form but a mere extension of the taxpayer in substance.[195] The nominee and alter ego concepts are closely related, and courts are often asked to address both in a single case.[196] For simplicity, we will refer to alleged nominees for the remainder of the Article, but it is worth noting that alleged alter egos face the same set of challenges.[197]

The *Internal Revenue Manual* (*Manual*), which is not binding authority, is the main source of Service guidance on when and how it pursues a nominee lien.[198] Unfortunately, its description of nominee liens is sparse, vague, and seemingly contradictory.[199] Although it lists general definitions and factors for agents to consider, the *Manual* lacks

190. *See, e.g.*, Treas. Reg. § 301.5329-1(a)(2), Q&A-A7 (as amended in 2007) (stating that a nominee of the delinquent taxpayer will not receive notice of the filing of an NFTL).

191. *See supra* Part III.

192. Richards v. United States (*In re* Richards), 231 B.R. 571, 578 (E.D. Pa. 1999).

193. *See* Treas. Reg. § 301.6320-1(a)(3), Q&A-A7, Q&A-B5; *id.* § 301.6330-1(a), Q&A-A2, Q&A-B5.

194. *See* United States v. Scherping, 187 F.3d 796, 801 (8th Cir. 1999).

195. *See id.*

196. *See, e.g.*, Oxford Capital Corp. v. United States, 211 F.3d 280, 283-84 (5th Cir. 2000) (addressing a levy imposed upon Oxford as both nominee and alter ego).

197. In fact, alleged alter egos are in a worse position. Nominees lose only the specific property at issue. INTERNAL REVENUE MANUAL, *supra* note 5, § 5.17.2.4.8.2(4). In contrast, all of the alter ego's assets are exposed because the alter ego is viewed merely as an extension of the taxpayer. *Id.* § 5.17.2.4.8.1(1).

198. *See Oxford*, 211 F.3d at 285-86 (noting that the Service's failure to follow nominee lien procedures in the *Manual* was not fatal to its collection action).

199. *See* INTERNAL REVENUE MANUAL, *supra* note 5, § 5.17.2.4.8.2.

detail on the procedural process used to make a determination.[200] It defines *nominee* as an "individual who holds legal title to property of a taxpayer while the taxpayer enjoys full use and benefit of that property."[201] In other words, the federal tax lien extends to property "'actually'" owned by the taxpayer even though a third party holds "'legal'" title to the property as nominee.[202]

Although the definition sounds as though it would be easy to apply, it requires a facts and circumstances analysis.[203] There is not one determinative factor. The Service itself, in varying sources, has more than one nonexhaustive, nonexclusive list of factors to consider when determining if a person is a nominee of the targeted taxpayer.[204] The *Manual* lists these factors:

a. The taxpayer previously owned the property.
b. The nominee paid little or no consideration for the property.
c. The taxpayer retains possession or control of the property.
d. The taxpayer continues to use and enjoy the property conveyed just as the taxpayer had before such conveyance.
e. The taxpayer pays all or most of expenses of the property.
f. The conveyance was for tax avoidance purposes.[205]

An *IRS Litigation Guidance Memorandum* lists additional factors such as whether there was a close relationship between the taxpayer and the nominee and whether the parties failed to record the conveyance.[206]

The *Manual* goes on to say that the factors used to determine whether a nominee situation exists are usually *identical* to those used to determine whether a taxpayer has conveyed property fraudulently with the purpose of keeping it from creditors.[207] But another section of the *Manual* instructs that while they have similar characteristics, a fraudulent conveyance should be distinguished from a nominee situation.[208] There are five determining factors listed, but they are less than robust.[209] Their essence is that fraudulent conveyances are intended to effect an actual transfer of property (or an interest in property) while transfer to a "nominee" is merely a "simulated

200. *Id.*
201. *Id.* § 5.17.2.4.8.2(1).
202. *Id.*
203. *Id.* The *Manual* lays out a suggested list of factors to consider when determining whether a property holder is a nominee. *Id.* § 5.17.2.4.8.2(2).
204. *See id.*; I.R.S. Litig. Guidance Mem. GL-21 (Oct. 31, 1989).
205. INTERNAL REVENUE MANUAL, *supra* note 5, § 5.17.2.4.8.2(2).
206. I.R.S. Litig. Guidance Mem. GL-21, *supra* note 204.
207. INTERNAL REVENUE MANUAL, *supra* note 5, § 5.17.2.4.8.2.
208. *Id.* § 5.17.14.2.4(2).
209. *See id.*

transfer" that is not intended to divest the transferor of any rights to the property.[210] "An example of a nominee situation," according to the *Manual*, "is a conveyance of property to a party with the understanding that the property will be returned to the transferor after the transferor's creditors lose interest in collecting their claims."[211] The distinction is critical. As discussed below, the administrative and judicial remedies available to an alleged recipient of a tax debtor's property vary according to the Service's characterization of the transaction.[212] A "nominee" is entitled to almost no administrative access, while the recipient of fraudulently conveyed property has early access to the Service and courts.[213]

B. Case Development by the Internal Revenue Service

When the Service chooses to proceed against a transferee as a nominee, the *Manual* directs agents to consider certain circumstances when developing the case, including:

a. the taxpayer is paying maintenance expenses,
b. the taxpayer is using the property as collateral for loans,
c. the taxpayer is paying state and local taxes on the property,
d. other use or benefit from the property[, and]
e. other relevant facts.[214]

After the consideration of these factors, the agent must get written approval from the Service's in-house attorneys prior to filing a nominee lien; however, subsequent enforcement of the lien occurs at the field office's discretion, subject to further review upon levy.[215]

Nominee liens usually pertain to specific pieces of a delinquent taxpayer's property that were conveyed to a nominee.[216] "Since the federal tax lien only attaches to property actually 'owned' by the taxpayer, it may not reach all property that is, in fact, actually owned by the nominee."[217] The Service's litigation guidance also provides that

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210. *Id.*
211. *Id.*
212. *See* Treas. Reg. §§ 301.6320-1, 301.6330-1 (as amended in 2007) (neither granting CDP rights to nominees); I.R.S. Notice CC-2006-019, *supra* note 56, at 10 ("The IRS will not give an opportunity for a CDP hearing to a known nominee of . . . the taxpayer."). These deprivations contrast with the detailed procedural rights afforded transferees under the INTERNAL REVENUE MANUAL, *supra* note 5, § 5.17.14.3.1.
213. *See* discussion *supra* note 212.
214. INTERNAL REVENUE MANUAL, *supra* note 5, § 5.12.2.6.5(3) (2007).
215. *Id.* § 5.12.2.6.5(4)-(5).
216. *Id.* § 5.17.2.4.8.2(4).
217. *Id.*

> [i]n situations where administrative action is contemplated against property in the hands of a transferee or nominee, Service personnel have been instructed to exercise caution and good judgment. District counsel approval or confirmation of any determination of nominee, transferee or alter ego status is required prior to initiation of lien or levy action.[218]

In a perfect world, perhaps these admonitions would provide alleged nominees with sufficient protection. In the real world, they do not.

C. *Case Development in Courts*

A nominee who is lucky enough to retain counsel familiar with the issue will very likely, at some point, find herself before a court. Because the *Manual*, which is really just a set of internal operating procedures, carries little weight as a legal authority, courts have looked primarily to other jurisdictions when faced with nominee questions.[219] Although the cases vary, most state and federal courts agree that the widespread judicial definition of a nominee is "a person or entity who holds legal title to property that in truth belongs to another who exercises control over and realizes the benefit of it."[220]

Due to the nonstatutory nature of the nominee theory, courts have been faced with a dearth of state precedent.[221] As a result, most of them have, in the past, looked to other jurisdictions.[222] Accordingly, the bulk of decisions can be traced to a single Montana case, *Towe Antique Ford Foundation v. IRS*, which was the first decision to amalgamate factors used in other courts' decisions.[223] While not all courts use the same list of factors to determine whether a person is a nominee, many have settled on the following six, which are similar but not identical to those named in the *Manual*:

(1) whether inadequate or no consideration was paid by the nominee;

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218. I.R.S. Litig. Guidance Mem. GL-21, *supra* note 204.

219. *See, e.g.*, Nantucket Vill. Dev. Co. v. United States, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,202, at 87,331-32 (N.D. Ohio 2001) (examining the reasoning of, among others, *United States v. Letscher*, 83 F. Supp. 2d 367, 375 (S.D.N.Y. 1999), and *Hill v. United States*, 844 F. Supp. 263, 270 (W.D.N.C. 1993), in trying to come to an understanding of nominee doctrine).

220. Sumpter v. United States, 302 F. Supp. 2d 707, 720 (E.D. Mich. 2004).

221. *See Hill*, 844 F. Supp. at 270 (turning to federal law after finding few state "cases dealing specifically with nominee status").

222. Scoville v. United States, 2000-1 U.S. Tax Cas. (CCH) ¶ 50,163, at 83,369 (W.D. Mo. 1999) (citing First Home Sav. Bank v. C & L Farms, Inc., 974 S.W.2d 621, 626 (Mo. Ct. App. 1998); Towe Antique Ford Found. v. IRS, 791 F. Supp. 1450, 1458 (D. Mont. 1992), *aff'd*, 999 F.2d 1387 (9th Cir. 1993) (turning to other states' common law to determine whether a person is the nominee of a delinquent taxpayer).

223. *Towe*, 791 F. Supp. at 1454.

(2) whether the property was placed in the nominee's name in anticipation of a lawsuit or other liability while the transferor remains in control of the property;
(3) whether there is a close relationship between the nominee and the transferor;
(4) whether they failed to record the conveyance;
(5) whether the transferor retained possession; and
(6) whether the transferor continues to enjoy the benefits of the transferred property.[224]

These factors are notoriously difficult to apply, particularly in situations where the delinquent taxpayer and the accused nominee are members of the same family.[225] For instance, one author has noted a Montana District Court opinion that

> warned against according too much weight to the relationship factor in the intra-family transfer context. Rejecting the Service's claim that a taxpayer's son held property as the taxpayer's nominee, the *Turk* court concluded that the Service's argument to apply the nominee theory placed too much emphasis on the close relationship between the taxpayer and his son. The court warned that the Service had allowed the close relationship factor to "swallow each of the other categories. This is not a reliable analysis."[226]

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224. Spotts v. United States, 2005 FED App. 0441P ¶ 11 n.2 (6th Cir.) (citing Porta-John of Am., Inc. v. United States, 4 F. Supp. 2d 688, 701 (E.D. Mich. 1998)). It bears noting that some courts have not confined themselves to judicial sources of authority. For instance, in *Holman v. United States*, 2005-1 U.S. Tax Cas. (CCH) ¶ 50,277, at 87,710 (D. Utah 2005), the court discussed testimony of a Service officer. The officer explained that when the Service suspects that property is held by a nominee, it typically serves a summons on the utility companies serving the property to determine whether the delinquent taxpayer is responsible for the relevant bills. *Id.* In *Spotts*, which relied on sister courts and the *Manual* for guidance, the court quoted a letter from the Service to the taxpayer's counsel:

> "[A] nominee filing should only be done where the facts and circumstances attending the purchase and/or transfer of property clearly show that the property was acquired and/or transferred in the name of another with a specific intent on the part of a taxpayer to evade or defeat the payment of a known tax liability."

Spotts, 2005 FED App. 0441P ¶ 5 n.1. The test, in other words, has not only a factual element, i.e., who pays the utility bills, but also an element of mens rea, and these elements were inferred not only from judicial precedent but also from litigating positions of the Service. *Id.*

225. Pamela R. Shisler, *Altering the Alter Ego Doctrine: Misapplication and Gender Issues in* Spotts v. United States, 59 TAX LAW. 309, 320 (2005) (highlighting gender issues in nominee theory as applied to spouses).

226. *Id.* (footnotes omitted) (citing Turk v. IRS, 127 F. Supp. 2d 1165, 1168 (D. Mont. 2000)).

The United States Court of Appeals for the Sixth Circuit also addressed the danger of affording certain nominee factors too much weight.[227] In *Spotts v. United States*, it wrote:

> The factors used by courts to determine nominee status are most enlightening when the alleged nominee and the alleged true beneficial owner have the type of relationship where both individuals would not normally be expected to simultaneously act as true owners. The factors are less probative in the context of a home purchase by a married couple because even if the home is only titled in one name, both ordinarily act as true owners. Stated another way, several of the factors used by courts will provide the same answer for *every* marital relationship in this context, thus providing little utility in distinguishing tax shams from legitimate titling decisions between spouses. Regardless, the ultimate inquiry requires consideration of all the facts and circumstances to determine the true beneficial owner of the property.[228]

In order to understand the application of nominee theory, as with any facts and circumstances determination, it is necessary not only to iterate the applicable standard, but also to examine relevant case law. The following paragraphs consider particular decisions of the Sixth Circuit and its district courts.

D. The Sixth Circuit as a Microcosm

Decisions of the Sixth Circuit provide a useful illustration of the nominee theory at work. Each decision reaches a slightly different conclusion. As noted below, the culprit behind courts' varied interpretations of nominee theory may simply be the contrived nature of the doctrine. The Service's creation of the nominee as a category of transferee distinct from the recipient of a fraudulent conveyance has provided courts with leeway for creative thought.[229]

The leading Sixth Circuit case on nominee theory is *Spotts*.[230] In *Spotts*, a husband and wife purchased a home, which was titled in the wife's name.[231] The couple also participated in a tax shelter using an offshore account.[232] They later divorced, and the husband moved out.[233]

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227. *See Spotts*, 2005 FED App. 0441P, ¶ 11 n.2 ("[T]he ultimate inquiry requires consideration of all the facts and circumstances . . . .").

228. *Id.*

229. *See infra* Part IV.D.

230. *Spotts*, 2005 FED App. 0041P.

231. *Id.* ¶ 2.

232. *Id.*

233. *Id.* ¶ 3.

During the divorce proceedings, the husband's attorney advised him to consult a lawyer about his offshore activities.[234] After doing so, the husband filed amended tax returns but was unable to pay the entire outstanding debt.[235] As part of its collection action against the husband, the Service placed a nominee lien on the wife's house.[236]

The wife brought a quiet title action in the United States District Court for the Eastern District of Kentucky, and the court granted summary judgment to the Service.[237] The Sixth Circuit reversed the district court's holding because the district court failed to properly consider state law.[238] The court noted that "[a] federal tax lien does not arise or attach to property in which a person has no interest under state law."[239] Consequently, the district court was required to consider Kentucky's statutes and jurisprudence prior to granting summary judgment for the government.[240]

The Sixth Circuit noted that under Kentucky law, the purchase of a residence by one spouse, who places title in the name of the other spouse, is presumed to be a gift.[241] A gift, the court reasoned, was different from a transfer to a nominee.[242] It concluded that although Kentucky recognized nominee transactions under the doctrine of constructive trust, the district court had not properly considered the state law regarding such transactions.[243] Furthermore, the district court failed to consider deposition testimony indicating that the husband had no intention to avoid collection at the time he titled the house in his wife's name.[244] The court concluded that because the husband "had not lived in the house or derived any beneficial interest related to the house for more than fourteen months" before the lien arose, it was "far from evident" that the wife was a nominee.[245]

Prior to *Spotts*, the district courts in the Sixth Circuit were, and may still be, in disarray.[246] The courts disagreed about the proper role

234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* ¶ 13.
238. *Id.* ¶ 14.
239. *Id.* ¶ 6.
240. *Id.* ¶¶ 11-12.
241. *Id.* ¶ 8.
242. *Id.* ¶ 9.
243. *Id.* ¶¶ 11-12.
244. *Id.* ¶ 12.
245. *Id.* ¶ 13.
246. *Compare* Andrews v. United States, 69 F. Supp. 2d 972, 981 (N.D. Ohio 1999) (holding that a fraudulent transferee was a nominee), *aff'd*, 225 F.3d 658 (2000), *with* Kaiser

of state law in the nominee inquiry, and in Ohio, they disagreed about the state's law itself.[247] In *Andrews v. United States*, the United States District Court for the Northern District of Ohio held that because the transfer of property from a mother to her son was a fraudulent conveyance under Ohio's statute, the son was a nominee for purposes of federal tax collection.[248] The court therefore refused to grant summary judgment to the son in a quiet title action brought against the United States.[249] The Sixth Circuit affirmed the district court in a summary opinion which held that "the taxpayer's transfer of property to her son was fraudulent; and thus . . . the lien attached to the property in dispute by the IRS was valid."[250]

In contrast, the United States District Court for the Southern District of Ohio in *Kaiser v. Stedman* held that because Ohio had a law of fraudulent conveyance upon which the Service could rely, the Service was foreclosed from using a nominee lien.[251] In an opinion that foreshadowed the *Spotts* decision, the court wrote that state law, rather than federal law, controls the determination of whether an individual is a nominee rather than the rightful owner of property.[252] The court could find "no reported federal opinions recognizing the nominee doctrine under Ohio law."[253] Furthermore, the United States had cited no case applying the nominee doctrine in Ohio.[254] The court then delivered its coup de grace:

> Moreover, the Court has an alternative justification for questioning the applicability of the nominee doctrine in this case. Where, as here, there is a conveyance of real estate claimed to be fraudulent and where, as here, Ohio statutory law not only provides the remedy, but also sets forth the standards for when a transfer is deemed to be fraudulent, this Court is of the opinion that the statutory requirements govern the transfer to the exclusion of some other theory such as the nominee theory.[255]

The court added, as a parting note, that the nominee factors on which the government requested consideration were nearly identical to the

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v. Stedman, 99-2 U.S. Tax Cas. (CCH) ¶ 50,861, at 89,856-57 (S.D. Ohio 1999) (holding that the Service could not use a nominee lien against a fraudulent transferee).

247. *See* cases cited *supra* note 246.

248. 69 F. Supp. 2d at 981.

249. *Id.* at 973, 982.

250. Andrews v. United States, 2000-2 U.S. Tax Cas. (CCH) ¶ 50,653 (6th Cir. 2000).

251. 99-2 U.S. Tax Cas. (CCH) at 89,856-57.

252. *Id.* at 89,856.

253. *Id.*

254. *Id.*

255. *Id.* at 89,856-57 (citations omitted).

fraudulent conveyance factors and refused, as a matter of law, to apply nominee theory to the case.[256]

The outcome in *Nantucket Village Development Co. v. United States* was different.[257] In *Nantucket Village*, the court criticized the *Kaiser* decision while attempting to harmonize it with the holding in *Andrews*.[258] The court described a veritable smorgasbord of reasoning employed by other jurisdictions to reconcile state and federal law where state law failed to explicitly recognize nominee doctrine.[259] For instance, some courts have held that it is well established that the Service may pursue a nominee in order to satisfy the taxpayer's debt without regard to a state's law.[260] Other courts have held that the state law and federal law were identical, and yet others have simply and properly used the particular state's alter ego, constructive trust, or equitable ownership doctrines to determine rights of an alleged nominee to property.[261]

The Northern District of Ohio chose the latter of these approaches, which was in keeping with the Southern District's reasoning in *Kaiser*.[262] The court found that contrary to the assertion of the Southern District, Ohio law recognizes the concept of equitable ownership, albeit without the using the term *nominee*.[263] Citing an Ohio case that relied upon *Black's Law Dictionary*, the court wrote that an equitable owner is

> "recognized in equity as the owner of property, because the real and beneficial use and title belong to him, although the bare legal title is vested in another .... There may therefore be two 'owners' in respect of the same property, one the nominal or legal owner, the other the beneficial or equitable owner."[264]

Finding this definition essentially the same as the Service's definition of "a nominee and/or alter ego," the court then discussed the recognition of equitable ownership by Ohio courts.[265] It noted that in

256. *Id.* at 89,857.

257. 2001-1 U.S. Tax Cas. (CCH) ¶ 50,202, at 87,334-35 (N.D. Ohio 2001).

258. *Id.*

259. *Id.* at 87,330-33.

260. *Id.* at 87,331 (citing United States v. Letscher, 83 F. Supp. 2d 367, 375 (S.D.N.Y. 1999)).

261. *Id.* at 87,334 (describing these approaches).

262. *Id.* at 87,335. The *Kaiser* court also looked to state doctrine. Kaiser v. Stedman, 99-2 U.S. Tax Cas. (CCH) ¶ 50,861, at 89,856-57 (S.D. Ohio 1999).

263. *Nantucket*, 2001-1 U.S. Tax Cas. (CCH) at 87,332 (citing Flint v. Holbrook, 608 N.E.2d 809, 814 (Ohio Ct. App. 1992)).

264. *Id.* (quoting *Flint*, 608 N.E.2d at 814).

265. *Id.* at 87,332-33.

Ohio, "one who makes out-of-pocket expenditures to complete repairs to property, pays utility expenses and shares responsibility for monthly mortgage payments may hold an equitable interest in the property, despite the fact that another holds title."[266] Accordingly, the court held that Ohio recognizes nominee theory despite applying a different nomenclature.[267]

Each of the district court cases described above—*Andrews*, *Kaiser*, and *Nantucket Village*—provided the groundwork for *Spotts*, the court's most current interpretation of nominee theory. Three things are apparent in these decisions. First, the Service must rely upon state law to establish that a nominee does not have beneficial ownership rights in property to which he holds title.[268] Second, courts do not fully understand the role of state fraudulent conveyance statutes in nominee lien cases, and this lack of understanding stems from the contrived nature of the nominee lien in contrast to the state or federal statutory nature of fraudulent conveyance.[269] Finally, the determination of whether a title holder is a nominee is practically indistinguishable from the determination of whether the title holder received property through fraudulent conveyance.[270] This suggests that in all but the strangest of instances, fraudulent conveyance proceedings would be a sufficient avenue of collection for the Service.

E. A Blurry Line

Indeed, nominee theory and fraudulent conveyance are so closely related that the Service frequently presents the two concepts to courts in tandem.[271] In a recent *Chief Counsel Advice Memorandum*, the

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266. *Id.* at 87,332.

267. *Id.* at 87,332-34.

268. *Id.* at 87,329.

269. *See* Kaiser v. Stedman, 99-2 U.S. Tax Cas. (CCH) ¶ 50,861, at 89,852-53 (S.D. Ohio 1999) (noting that fraudulent conveyance is governed by an Ohio statute).

270. *See Nantucket*, 2001-1 U.S. Tax Cas. (CCH) at 87,332-33 (noting the similarities between the Service's definitions of nominee and fraudulent conveyance situations).

271. *See* United States v. Swan, 467 F.3d 655, 658 (7th Cir. 2006); Hatchett v. United States, 2003 FED App. 0176P, ¶ 2 (6th Cir.); United States v. Noble, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,226, at 87,391 (6th Cir. 2001); United States v. Vance, No. 99-6291, 2000 U.S. App. LEXIS 12156, at *3 (10th Cir. June 2, 2000); United States v. Scherping, 187 F.3d 796, 799-801 (8th Cir. 1999); Colby B. Found. v. United States, 99-1 U.S. Tax Cas. (CCH) ¶ 50,211, at 87,306 (9th Cir. 1999); LiButti v. United States, 107 F.3d 110, 113 (2d Cir. 1997); Towe Antique Ford Found. v. IRS, 999 F.2d 1387, 1390 (9th Cir. 1993); United States v. Vellalos, No. 92-15491, 1993 U.S. App. LEXIS 6072, at *9 (9th Cir. Mar. 19, 1993); United States v. Isaac, No. 91-5830, 1992 U.S. App. LEXIS 16657, at *3 (6th Cir. July 10, 1992); United States v. Gonzales, No. 91-1074, 1991 U.S. App. LEXIS 33797, at *2 (10th

Service advised that it "may rely on alternate theories provided the precise distinctions between the theories are recognized and there are facts to support each theory."[272] The *Manual* outlines the distinctions between the theories.[273] According to the *Manual*, a transfer to a nominee is merely a "simulated transfer" that is "not intended to divest the transferor of any rights to the property."[274] In contrast, a fraudulent conveyance is usually "intended to effect an actual transfer of property or an interest in property."[275] It is therefore the subjective intent of the taxpayer, an issue of fact, that determines whether nominee theory or fraudulent conveyance laws apply.[276] The distinction is critical. The *Manual* states, "A nominee situation can be dealt with under the administrative nominee procedures, including the filing of nominee liens."[277] Fraudulent conveyance, however, "can only be set aside by a court."[278]

The transferor's intent seems a very slender thread upon which to hang a transferee, particularly when a difference in due process results. How does the Service distinguish one intent from another? Table 1 shows, side by side, the Service's most recent iteration of the nominee lien and fraudulent conveyance tests. All seven of the nominee lien factors are nearly identical to fraudulent conveyance factors. One wonders, then, whether the Service might not choose its theory, or alternative use of both theories, simply on the basis of prosecutorial ease. It may file a nominee lien and, if challenged, defend its collection action not only on nominee grounds but also on fraudulent conveyance grounds—a procedural lose/lose proposition for the alleged nominee.

Table 1: Comparison of Nominee Liability and Fraudulent Conveyance Factors[279]

Nominee Liability	Fraudulent Conveyance
No consideration or inadequate consideration paid by nominee	No consideration or inadequate consideration for the transfer

Cir. Dec. 17, 1991); Zahra Spiritual Trust v. United States, 910 F.2d 240, 245-47 (5th Cir. 1990); Shades Ridge Holding Co. v. United States, 888 F.2d 725, 728-29 (11th Cir. 1989).

272. I.R.S. Chief Couns. Adv. Mem., *supra* note 18, at 15.

273. INTERNAL REVENUE MANUAL, *supra* note 5, § 5.17.14.2.4.

274. *Id.* § 5.17.14.2.4(2).

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. I.R.S. Chief Couns. Adv. Mem., *supra* note 18, at 14-15.

Nominee Liability	Fraudulent Conveyance
Property placed in the name of the nominee in anticipation of suit or occurrence of liability while transferor maintains control over property.	Transfer made in anticipation of suit or occurrence of liability
Close relationship between transferor and nominee	Close relationship between transferor and transferee
Failure to record the conveyance	Failure to record the conveyance
Retention of possession by the transferor	Retention of possession by the transferor
Expenses of the property paid by the transferor	Assessment of real property taxes in the name of the transferor
Exercise of dominion or control by the transferor	Reservation of interest, trust, or benefit by the transferor
	Transferor retains security in excess of the transferee's debt
	Conveyance not in the usual course of business/transaction made in secrecy or haste
	Transfer of all of the debtor's property
	Debtor made insolvent by the transfer

Courts, naturally, conflate the two theories.[280] Despite the mutually exclusive nature of fraudulent conveyance and nominee theory—in one, the taxpayer intends to transfer the property, and in the other, he intends to keep it—courts have, with some regularity, used the two interchangeably.[281] For instance, in the oft-cited *Towe Antique Ford Foundation* case, the district court determined that the foundation against which the Service had collected was the alter ego or nominee of the delinquent taxpayer and that the taxpayer's transfer of cars to the foundation was a fraudulent conveyance.[282] The United States Court of Appeals for the Ninth Circuit affirmed the district court's alter ego

280. United States v. Swan, 467 F.3d 655, 658 (7th Cir. 2006); United States v. Vance, No. 99-6291, 2000 U.S. App. LEXIS 12156, at *2 (10th Cir. June 2, 2000); United States v. Boomershine, No. 91-7107, 1992 U.S. App. LEXIS 16742, at *5 (10th Cir. July 13, 1992); Shades Ridge Holding Co. v. United States, 888 F.2d 725, 728 (11th Cir. 1989).

281. *See* cases cited *supra* note 280.

282. Towe Antique Ford Found. v. IRS, 999 F.2d 1387, 1390 (9th Cir. 1993).

conclusion and held that, as a result, it would not reach the issue of fraudulent conveyance.[283] The court failed, however, to note that the two doctrines could not simultaneously apply.[284] The United States Court of Appeals for the Tenth Circuit held similarly in *United States v. Vance*, when it affirmed the district court's holding that a transferee was a nominee who had received property from a delinquent taxpayer through fraudulent conveyance.[285]

The Tenth Circuit is not alone in its confusion. Judge Posner wrote in a Seventh Circuit case: "Suppose a person who wants to evade taxes parks his property with a friend or a family member. That would be a fraudulent conveyance, and so the person to whom the property was conveyed would be deemed the taxpayer's 'nominee' and forced to cough it up."[286] This analysis does not, as noted earlier, coincide with the Service's conception of two distinct doctrines. The United States Court of Appeals for the Eleventh Circuit has also conflated the two concepts.[287] In *Shades Ridge Holding Co. v. United States* case, it used the heading "Nominee/Fraudulent Transferee Claims" to denominate a discussion of nominee status.[288]

How should attorneys interpret courts' conflation of the Service's two distinct doctrines? Perhaps the doctrines are not distinct after all. The difference highlighted by the *Manual*, the transferor's intent with regard to the ownership of property, may be the perennial "distinction without a difference."[289] In both nominee and fraudulent conveyance situations, a delinquent taxpayer has transferred property to a third party in order to evade the Service's collection action.[290] In either situation, the Service will turn its attention to the third party.[291] It therefore seems arbitrary to make the level of due process that the third party receives dependent upon the Service's opinion of the transferor's subjective intent.

283. *Id.* at 1393-94.

284. *Id.*

285. 2000 U.S. App. LEXIS 12156, at *3-4. The Sixth Circuit also conflated the two theories, stating that "[i]f a taxpayer attempts to avoid collection of a tax debt by transferring property into the names of third parties who act as nominees ... the transfers will be considered fraudulent." *Boomershine*, 1992 U.S. App. LEXIS 16742, at *5.

286. United States v. Swan, 467 F.3d 655, 658 (7th Cir. 2006).

287. Shades Ridge Holding Co. v. United States, 888 F.2d 725, 728-29 (11th Cir. 1989).

288. *Id.* at 728.

289. *See* Livingston v. Md. Ins. Co., 11 U.S. (7 Cranch) 506, 537 (1813).

290. *See* INTERNAL REVENUE MANUAL, *supra* note 5, § 5.17.14.2.4.

291. *Id.*

The distinction, and the coinciding difference in the tenor of the collection action, are particularly troublesome when viewed in light of section 6901 of the Code, which the Service may look to in fraudulent conveyance cases but refuses to consult in nominee cases.[292] Section 6901, which is discussed in greater detail below, provides that the liability of a transferee must be assessed and collected in the same manner as the debt of the delinquent taxpayer to which the liability relates.[293] Transferees under section 6901, then, have the same access to collection due process hearings as the taxpayers from whom they received property.[294] Nominees, however, are not "transferees" under section 6901 according to the Service and are therefore once again denied access to sections 6320 and 6330.[295]

Some courts have adopted the Service's position.[296] For example, in *Lemaster v. United States*, the Sixth Circuit held that a son who received title to the assets of a trucking business from his father, but who did not participate in the business, was a nominee rather than a transferee.[297] Although the son argued that the Service owed him due process under section 6901, the court found otherwise.[298] It wrote, "The flaw in plaintiffs' argument lies in the misguided notion that the issue of transferee rights is somehow involved in this dispute."[299] Other courts have reached similar conclusions.[300] In *Al-Kim, Inc. v. United States*, the Ninth Circuit wrote that section 6901 was inapplicable where "[a]lthough the Commissioner addressed the appellants collectively as 'alter egos, nominees, or transferees,' he treated them as

292. *See* I.R.S. Chief Couns. Adv. Mem., *supra* note 18, at 15 (providing that transferee liability, which can be asserted administratively under section 6901, is generally based on fraudulent conveyance under state law).

293. I.R.C. § 6901(a) (2000).

294. *Id.*

295. *See* Baum Hydraulics Corp. v. United States, 2005-2 U.S. Tax Cas. (CCH) ¶ 50,623, at 89,713 (D. Neb. 2005) (discussing the government's argument that "[t]he filing of a notice of federal tax lien, including one that alleges a transferee/alter ego/nominee status is not a means of asserting transferee liability under § 6901" (internal quotation marks omitted)).

296. *See* Lemaster v. United States, 891 F.2d 115, 119 (6th Cir. 1989) (holding that because the plaintiff was an alter ego or nominee of the delinquent taxpayer, procedural requirements for collection under section 6901 were irrelevant); Al-Kim, Inc. v. United States, 650 F.2d 944, 947 n.8 (9th Cir. 1979) (noting that section 6901 is inapplicable to nominees); Sequoia Prop. & Equip. Ltd. P'ship v. United States, 97-2 U.S. Tax Cas. (CCH) ¶ 50,841, at 90,276 (E.D. Cal. 1997) (stating that nominees are not entitled to procedural protections under section 6901).

297. *Lemaster*, 891 F.2d at 117, 119.

298. *Id.* at 119.

299. *Id.*

300. *See supra* note 296 and accompanying text.

alter egos or nominees, not transferees."[301] And, the position was summarized in *Sequoia Property & Equipment Ltd. Partnership v. United States*, which held: "Under 26 U.S.C. § 6901, the IRS is authorized to collect a tax debt from a transferee of the initial tax debtor. Transferees are entitled to the same procedural protections as the original tax debtor. Nominees . . . however, are not entitled to those procedural protections."[302]

The Service's reason for not treating alleged nominees as transferees under section 6901 is not immediately apparent. The statute provides that "the term 'transferee' includes donee, heir, legatee, devisee, and distributee."[303] While this definition does not explicitly (or even implicitly) include nominees, it does not exclude them either. The same is true of the Treasury Regulations, which provide a fuller interpretation.[304] The regulations define *transferee* as also including "the assignee or donee of an insolvent person" as well as "all other classes of distributees."[305] These additional categories seem broad enough to encompass alleged nominees. Furthermore, nothing in the legislative history evinces an intention to exclude nominees (although neither does it include them). Finally, although it refuses to apply section 6901 to alleged nominees, the Service sometimes employs the terms *nominee* and *transferee* in tandem when issuing notices of nominee liens.[306] When taken in full, the statute, regulations, and common usage suggest that nominees are not so different from transferees as to deserve procedural ostracism, if, indeed, they are different at all.

Whatever its reason, the Service's insistence that section 6901 does not apply to alleged nominees leaves them in a position unlike that of any other transferee subject to collection. No provision of the

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301. 650 F.2d at 947 n.8.

302. 97-2 U.S. Tax Cas. (CCH) ¶ 50,841, at 90,276 (E.D. Cal. 1997) (citations omitted).

303. I.R.C. § 6901(h) (2000).

304. Treas. Reg. § 301.6901-1(b) (1967).

305. *Id.*

306. *See* Al-Kim, Inc. v. United States, 650 F.2d 944, 946 (9th Cir. 1979) (noting that the levies designated plaintiffs as "nominees and transferees" of tax debtors); State St. Bank & Trust Co. v. United States, 729 F. Supp. 1402, 1403 (D. Mass. 1990) (denying injunctive relief to plaintiffs who sought to enjoin the Service from instituting collection action against trustees as transferees or nominees); Williamson v. Comm'r, 65 T.C.M. (CCH) 2941, 2944 (1993) (stating that the Service filed an NFTL against a "nominee/transferee"); Estate of DeNiro, 38 T.C.M. (CCH) 721, 722 (1979) (stating that the Service filed a jeopardy assessment against the DeNiro brothers as "nominees or transferees" of father's estate); Wills Corp. v. Comm'r, 28 T.C.M. (CCH) 174, 176 (1969) (noting that the Service made alternative claims that a corporation was a transferee or a nominee of the tax debtors).

Code provides them with administrative or judicial review of the collection action prior to levy. This situation is particularly unfair because a collection action can span an entire decade before the Service levies against the alleged nominee's property.[307] During that time, the nominee cannot use the property to secure loans, cannot alienate the property for its fair market value, and cannot effectively plan for the future.[308] Furthermore, the alleged nominee risks losing the value of any repairs or improvements that she makes to the property.[309] This situation highlights the relative disadvantage of an individual who has been labeled "nominee" by the Service in comparison to any other recipient of a tax debtor's property.

V. WHAT CAN'T A NOMINEE DO?

The crux of the matter is that alleged nominees should have a means by which to receive a prompt administrative and judicial review of the Service's determination of nominee status. However, a review of the available authorities makes it apparent that nominees are not afforded such a means.[310] Despite the taxpayer's recent receipt of collection due process rights,[311] alleged nominees continue to lack an effective means by which to contest the Service's allegation of nominee status.[312]

As described in the prior Parts, the Service denies alleged nominees collection due process in such situations because the nominee is "not the taxpayer."[313] In a recent notice issued by the Office of the Chief Counsel, the Service stated that collection due process rights are "only available to the delinquent taxpayer—the person liable to pay the tax due after notice and demand who refuses or neglects to pay. The [Service] will not give an opportunity for a CDP hearing to a known nominee of, or person holding property of, the taxpayer."[314] The

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307. *See* I.R.C. § 6502(a)(1) (2000) (providing that the statute of limitations for collection is ten years).

308. *See supra* Part I.

309. *See supra* Part I.

310. *See, e.g., Collection Appeal Rights*, I.R.S. Publ'n 1660, at 3 (rev. Aug. 2007) ("You . . . cannot proceed to court if you don't agree with Appeals' decision in your CAP case.").

311. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, 746-50.

312. I.R.S. Publ'n 1660, *supra* note 310, at 3.

313. Treas. Reg. §§ 301.6320-1(a)(2), Q&A-A7, 301.6330-1(a)(3), Q&A-A2 (as amended in 2007).

314. I.R.S. Notice CC-2006-019, *supra* note 56, at 10.

following paragraphs summarize due process rights that the Service has declared inapplicable to alleged nominees.

A. *Denial of Collection Due Process*

What does an alleged nominee miss? As discussed in Part I, collection due process is available to an ordinary taxpayer in two situations: (1) upon the filing of a notice of federal tax lien[315] and (2) upon the filing of a notice of intent to levy.[316] As described above, a taxpayer has the right to receive notice of the filing of an NFTL,[317] to administratively appeal the notice,[318] and to seek a judicial review of the appeals determination.[319] The effects of these rights are many. First, the taxpayer has specific knowledge about the Service's collection action.[320] Second, the taxpayer can administratively oppose the collection action and can be assured that the Service will consider his position.[321] In addition, the taxpayer has the right to petition and receive a hearing regarding any error or impropriety in the filing of the NFTL.[322] If, at the hearing, the Service determines that the filing was erroneous, it is required to issue expeditiously a certificate of release of the lien.[323] If, instead, the Service determines that the filing was not erroneous, then the taxpayer may seek judicial review of its determination.[324] Thus, the taxpayer has multiple opportunities to petition for release of the lien on his property. An alleged nominee, in contrast, is denied these opportunities.

At the levy stage, the taxpayer has the right to receive notice of his right to request an administrative appeals conference,[325] to receive an administrative appeals conference,[326] and to seek judicial review of the appeals determination.[327] Again, these rights protect the taxpayer in many ways. First, the Service may not place a levy on the taxpayer's property before it has notified the taxpayer of his right to request an

315. I.R.C. § 6320 (West Supp. 2007).
316. *Id.* § 6330 (West, Westlaw through 2007 amendments).
317. *Id.* § 6320(a)(1) (2000).
318. *Id.* § 6320(b).
319. Treas. Reg. § 301.6320-1(b)(2), Q&A-B3 (as amended in 2007).
320. I.R.C. § 6320(a)(3).
321. *Id.* § 6320(b) (West Supp. 2007).
322. *Id.* § 6326(a) (2000).
323. *Id.* § 6326(b).
324. Treas. Reg. § 301.6320-1(b)(2), Q&A-B3.
325. I.R.C. § 6330(a).
326. *Id.* § 6330(b) (West Supp. 2007).
327. *Id.* § 6330(d); Treas. Reg. § 301.6330-1(b)(2), Q&A-B2.

appeals conference.[328] The effect of this requirement is simultaneously to provide the taxpayer with specific knowledge about the Service's action while delaying the action until the taxpayer can protect himself should the action be unfounded.[329] In addition, the taxpayer has the right to an appeals conference if requested and can therefore prevent the levy altogether if he succeeds in asserting that the levy would be improper.[330] Finally, if the appeals officer renders an unfavorable determination, the taxpayer may seek a judicial review of the determination in the Tax Court.[331] As with section 6320, the Service denies alleged nominees access to any of these rights.[332]

How does the Service justify its position? One source of authority on this issue comes in the form of a rather confused district court decision.[333] In *Forman v. United States*, the United States District Court for the Northern District of Illinois rendered nominee liens essentially unreviewable within the district.[334] The Service sought to collect the tax debt of a husband by placing a nominee lien on property held solely by his wife.[335] In his CDP hearing, the husband argued that the property titled in his wife's name was not his property and was therefore immune from collection.[336] When the appeals office rendered an adverse decision, both the husband and the wife filed an action in the district court.[337] The wife, who was an alleged nominee, argued that she had been denied CDP rights under section 6330.[338] She also filed a claim to quiet title.[339] The husband, in turn, argued that the Service could not legally collect property that did not belong to him.[340] The court granted summary judgment to the Service on all but the quiet title claim.[341]

In its ruling, the court determined that the wife did not have CDP rights with regard to the lien because she was not the "taxpayer" under

328. I.R.C. § 6330(a)(1) (2000).

329. *Id.* § 6330(e).

330. *Id.* § 6343.

331. *Id.* § 6330(d) (West Supp. 2007); Treas. Reg. § 301.6330-1(b)(2), Q&A-B2.

332. *See* Treas. Reg. § 301.6330-1(b)(2), Q&A-B5.

333. Forman v. United States, 2005-1 U.S. Tax Cas. ¶ 50,418, at 88,193 (N.D. Ill. 2005).

334. *Id.* at 88,194 (holding that because plaintiff was not a taxpayer she had no right to judicial review).

335. *Id.* at 88,193.

336. *Id.*

337. *Id.*

338. *Id.* at 88,194.

339. *Id.* at 88,193.

340. *Id.* at 88,194.

341. *Id.*

section 6321, a section that permits the Service to file a notice of federal tax lien.[342] Second, the court determined that the husband did not have standing to contest the nominee lien.[343] The court reasoned that because the husband had disclaimed ownership of the property, he had no justiciable interest.[344] Thus, the court effectively provided an administrative lose-lose situation to the *Forman* plaintiffs and to others in their situation.[345] The husband could not plead an interest in the property without subjecting it to collection; therefore, he could not raise administrative arguments or bring suit.[346] But the wife, who had a justiciable interest in the property, was precluded from seeking administrative relief because she was the actual, rather than the nominal, target of the Service's collection action.[347] Although the court did not dismiss the wife's claim to quiet title, as we will discuss below, such actions are often unsatisfactory for reasons of time and expense.[348]

The *Forman* plaintiffs' situation was untenable. Collection due process, if applied to nominees, would provide an avenue by which taxpayers and alleged nominees could avoid the administrative catch-22 created by the *Forman* court's reasoning. Unfortunately, administrative and judicial authorities deny alleged nominees access to the relevant statutory protections.[349] As a result, alleged nominees are precluded from directly defending their interests in property under sections 6320 and 6330.[350]

342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.* ("[The wife]'s action to quiet title, remains.").
349. *See infra* Part V.B-D.
350. It seems unthinkable, given our popular notion of constitutional due process, that the government could encumber any citizen's property without providing some timely and effective means of review. Nonetheless, in 1931, the Supreme Court held that collection of taxes without a preseizure judicial hearing did not offend the Due Process Clause as long as the taxpayer was afforded a postseizure determination of rights. *See* Phillips v. Comm'r, 283 U.S. 589, 596-97 (1931). Alleged nominees have such remedies in the form of quiet title and wrongful levy suits. *See* 28 U.S.C. § 2410 (2000); I.R.C. § 7426 (2000). Therefore, despite the serious drawbacks associated with those suits, no constitutional challenge will force the Service to treat alleged nominees differently. Although the Court later refined this position somewhat, the current revenue laws continue to pass constitutional muster. Fuentes v. Shevin, 407 U.S. 67, 91-92 (1972) (reaffirming *Phillips* but emphasizing that seizure before an opportunity for a hearing is permissible only in limited circumstances).

B. Denial of Transferee Status Under Section 6901

Section 6901 of the Code, if it applied to alleged nominees, would provide indirect access to sections 6320 and 6330 and a wealth of due process rights, including the right to make an offer in compromise to settle the case.[351] The section provides that "[t]he amounts of the following liabilities shall . . . be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred."[352] Congress made the statute specifically applicable to income taxes, which means that if it were available, it would provide due process rights in most nominee cases.[353]

When the nominee is not assessed under section 6901, she is not afforded the CDP rights provided to a "transferee."[354] The CDP rights provided to a transferee are identical to those provided the taxpayer and are sweeping.[355] With a nominee lien in place, however, it is possible for an alleged nominee's property to remain encumbered for more than a decade.[356] In addition, the alleged nominee is precluded from petitioning the Tax Court for a redetermination of tax liability.[357]

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351. I.R.C. § 6901; *id.* § 7122 (West Supp. 2007).

352. I.R.C. § 6901(a) (2000).

353. *Id.*

354. *See, e.g.*, Al-Kim, Inc. v. United States, 650 F.2d 944, 947 n.8 (9th Cir. 1979) (stating that section 6901 does not apply to nominees).

355. INTERNAL REVENUE MANUAL, *supra* note 5, § 5.17.14.3.1(4). The *Manual* states:

> a. A notice of transferee or fiduciary liability must be mailed to the last known address of the transferee or fiduciary.
>
> b. The transferee or fiduciary may petition the United States Tax Court.
>
> c. The liability will be assessed against the transferee or fiduciary if (1) the Tax Court enters a decision against the transferee or fiduciary; (2) the transferee or fiduciary defaults on the notice of liability; or (3) the transferee or fiduciary agrees to an assessment of the liability.
>
> d. Once the liability is assessed, a lien is created which attaches to all property of the transferee or fiduciary. A Notice of Federal Tax Lien must be filed to protect the Service's interests under I.R.C. § 6323.
>
> e. The assessment may be collected administratively from all property and rights to property of the transferee or fiduciary.

Id. § 5.17.14.3.1.(4).

356. *See* I.R.C. § 6502. Other portions of the Code may toll the statute upon the occurrence of various events, which means that a collection action may last for more than a decade. *Id.*

357. *See* L.V. Castle Inv. Group, Inc. v. Comm'r, 465 F.3d 1243, 1247 (11th Cir. 2006) (holding that a transferee cannot petition the tax court until he has been assessed liability under section 6901); Gott v. Live Poultry Transit Co., 153 A. 801, 806 (Del. Ch. 1931) ("Where there is no attempt to assess a tax against a transferee as such . . . the transferee is not the taxpayer and is therefore not entitled to take an appeal against a proposed deficiency assessment.").

As noted above, alleged nominees lack standing.[358] As a consequence, the Service cannot effectively be challenged on the issue of a nominee's status. Instead, alleged nominees seeking a judicial remedy must pursue either a quiet title action or a wrongful levy suit.[359] Section 6902 specifies that in transferee cases, the Service must present evidence that the person from whom it seeks to collect "is liable as a transferee of property of a taxpayer."[360] No comparable requirement exists for wrongful levy or quiet title actions.[361] In those actions, the alleged nominee, and not the Service, will bear the burden of proof.[362]

Another right that is unavailable to an alleged nominee, but that is available to transferees, is the offer in compromise.[363] By definition, an offer in compromise is the settlement of unpaid tax accounts for less than the full amount of the assessed tax balance.[364] Generally, the Service will accept an offer in compromise when it is unlikely that the entire tax liability can be collected.[365] Thus, if a transferee is assessed liability under section 6901, and the Service is unlikely to collect the entire tax liability, a transferee may attempt to negotiate a settlement. For instance, in *Revenue Ruling 72-436*, the Service assessed liability against a transferee under section 6901 and held that "[t]he acceptance of the transferee's offer in compromise does not compromise the liability of the transferor."[366] Thus, the offer in compromise is clearly available to a transferee under section 6901.

In contrast, when a recipient of transferred property is treated as a nominee, she may not pursue an offer in compromise.[367] In *Private Letter Ruling 1999-17-020*, the Service held that an offer in compromise is not available to the nominee in his own right when he is held liable via a nominee lien.[368] The Service also stated that a "nominee lien can be extinguished only by satisfying the underlying liability, whether by full payment or by compromise agreement

358. *See supra* note 357 and accompanying text.
359. *See infra* Part VI.
360. I.R.C. § 6902(a).
361. *See infra* Part VI.
362. *See infra* Part VI.
363. I.R.C. § 7122(a) (West Supp. 2007) ("The [Service] may compromise any civil or criminal case arising under the internal revenue laws . . . .").
364. *Id.*
365. INTERNAL REVENUE MANUAL, *supra* note 5, § 1.5.18 (1992); *id.* § 5.8.1.1.3 (2005).
366. Rev. Rul. 72-436, 1972-2 C.B. 643.
367. I.R.S. Priv. Ltr. Rul. 1999-17-020 (Jan. 21, 1999).
368. *Id.* at 2.

executed by an individual with authority to do so."[369] The Service made it clear that a nominee is not an "individual with authority" unless the taxpayer authorizes the nominee to enter the offer in compromise on the taxpayer's behalf.[370] Thus, without the taxpayer's authority to enter a binding offer in compromise on the taxpayer's behalf, the nominee may not seek this remedial measure.[371] Finally, even if the offer in compromise were available to the nominee, it would not be a favorable option for the nominee since the nominee would be paying the taxpayer's debt. Transferees under section 6901 are not faced with a similar problem.[372]

Despite its procedural advantages, the application of section 6901 to alleged nominees would be a double-edged sword. The statute specifies that tax must be assessed against a transferee.[373] In other words, a transferee is more than just the holder of a transferor's property. She is actually liable for the transferor's debt, which means that the Service is not limited to collecting against the transferred property, and it can reach any of the transferee's assets.[374]

Liability for the taxpayer's debt is undoubtedly a disadvantage, but as such, it may be outweighed by another provision of the Code that provides access to judicial review of the Service's determination of transferee status.[375] Under section 6901, a transferee may seek judicial review in any instance in which the transferor could do so.[376] When a transferee seeks review, section 6902 provides the following: "In proceedings before the Tax Court the burden of proof shall be upon the Secretary to show that a petitioner is liable as a transferee of property

369. *Id.* (emphasis added).

370. *Id.*

371. *Id.*

372. Rev. Rul. 72-436, 1972-2 C.B. 644.

373. I.R.C. § 6901 (2000). The regulations provide:

> The amount for which a transferee of property of . . . [a] taxpayer . . . shall be assessed against such transferee . . . and paid and collected in the same manner and subject to the same provisions and limitations as in the case of a deficiency in the tax with respect to which such liability is incurred . . . .

Treas. Reg. § 301.6901-1(a)(1) (1967).

374. *See* INTERNAL REVENUE MANUAL, *supra* note 5, § 5.17.14.2.5 ("The creditor may recover judgment against the transferee for the *value* of the asset transferred." (emphasis added)).

375. I.R.C. § 6901. The regulations add that "[t]he provisions of the Code made applicable by section 6901(a) to the liability of a transferee . . . *include* the provisions relating to . . . the filing of a petition with the Tax Court of the United States and the filing of a petition for review of the Tax Court's decision." Treas. Reg. § 301.6901-1(a)(3) (emphasis added).

376. I.R.C. § 6901(a).

of a taxpayer . . . ."[377] The intent of this provision is clear: it was designed to protect persons accused of receiving property from a tax debtor when the property should have been used to satisfy the tax debt. Nominees fall into this class of persons; therefore, they should be provided an opportunity to put the Service to its proof on the issue of their status.

They are not so provided. Despite the plain language of section 6901, the Service and courts have found the statute inapplicable to alleged nominees.[378] The Service views section 6901 as merely one of several options by which it may hold the recipient of transferred property liable for a taxpayer's debt.[379] These options include, but are not limited to: (1) filing suit for a declaration of fraudulent conveyance,[380] (2) filing a nominee lien,[381] and (3) administratively imposing transferee liability under section 6901.[382] From the Service's viewpoint, each of these options provides a method by which it may collect the liability of the taxpayer from a third party.[383] The Service's assertion that these methods may be used virtually interchangeably allows it to choose what level of due process rights will be provided to the third party.

Although it seems extraordinary, courts have upheld the Service's position and have determined that an alleged nominee cannot be treated as a section 6901 transferee unless the Service has taken specific steps to assess the nominee as such.[384] In *Kellogg v. Commissioner*, the Tax Court held that it had no jurisdiction over the petitioner's claim because no notice of transferee liability had been issued to petitioner.[385] The *Kellogg* court found that although the petitioner had received a letter regarding taxes due for another, the letter was not in fact a notice of transferee liability because the letter did not determine the amount owed and did not notify the petitioner that a liability would be assessed.[386] Since the petitioner had not received a notice of transferee liability that satisfied section 6901, the

377. *Id.* § 6902(a).
378. *See supra* Part IV.
379. *See* INTERNAL REVENUE MANUAL, *supra* note 5, §§ 5.17.2.4.8.2, 5.17.14.1, 5.17.14.3.1.
380. *Id.* § 5.17.14.1.
381. *Id.* § 5.17.2.4.8.2.
382. *Id.* § 5.17.14.3.1.
383. *See id.* §§ 5.17.2.4.8.2, 5.17.14.1, 5.17.14.3.1.
384. *See, e.g.*, Kellogg v. Comm'r, 88 T.C. 167, 175 (1987) (holding that only proper notice of an assessment of transferee liability triggers rights under § 6901).
385. *Id.*
386. *Id.*

court determined that it did not have jurisdiction to hear the petitioner's case.[387]

In *L.V. Castle Investment Group, Inc. v. Commissioner*, the Eleventh Circuit reaffirmed the *Kellogg* holding when it held that the transferee must receive a notice of transferee liability under section 6901 in order to challenge the Commissioner's determination of tax liability.[388] The *Castle* court explained that only after a transferee received notice of tax liability under section 6901 would the court have jurisdiction to entertain an argument regarding the due process rights afforded to transferees through that section.[389] Finally, as noted above, a handful of courts have ignored the jurisdictional nature of the transferee assessment and have specifically held that a nominee cannot be a transferee under section 6901.[390] It is, therefore, absolutely clear that alleged nominees cannot seek relief through section 6901.

In summary, the Service has more or less created a variety of methods by which it may collect a taxpayer's debt from a recipient of transferred property, and although these methods are applied to similarly situated property recipients, each provides a different level of due process. The Service also takes the position that it is not required to treat an alleged nominee as a transferee for purposes of section 6901, even though these two categories of property recipients are virtually indistinguishable.[391] This position leaves the Service free to choose the method, and therefore the level, of due process to which a recipient of transferred property will have access. Consequently, it may categorize nearly any property recipient as a nominee, thereby depriving the recipient of administrative CDP. By doing so, the Service also avoids bearing the burden of proof under section 6902.[392]

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387. *Id.*

388. L.V. Castle Inv. Group, Inc. v. Comm'r, 465 F.3d 1243, 1247-48 (11th Cir. 2006).

389. *Id.*; *see* Gott v. Live Poultry Transit Co., 153 A. 801, 806 (Del. Ch. 1931).

390. *See supra* Part V.

391. *See* I.R.S. Chief Couns. Adv. Mem., *supra* note 18, at 14-15 (listing nearly identical factors for determining nominee or transferee status).

392. It bears noting that an alleged nominee, like other persons, can seek an injunction within limited confines. However, the injunction is statutorily prohibited when sought regarding the assessment or collection of nominee liability for income taxes. I.R.C. § 7421(b)(1) (2000). Although the statutory language clearly bars injunctions in the context mentioned, the Supreme Court has provided a two-part exception to the rule. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962). This exception requires the petitioner to prove the following: (1) it must appear "under the most liberal view of the law and the facts" that the government will not be able to establish its claim and (2) that the petitioner will "suffer irreparable injury" without an injunction. *Id.* The two-part test was reaffirmed by a later decision that more clearly stated that an injunction may not issue unless "(1) it is 'clear that under no circumstances could the government ultimately prevail' and

Furthermore, an alleged nominee, because she is not a transferee under section 6901, cannot even compromise the amount owed to the Service.[393] It is therefore not an overstatement to say that alleged nominees, whether or not innocent, find themselves in a situation that is difficult when compared to that of similarly situated recipients of property whom the Service classifies as transferees under section 6901.

C. Administrative Appeal of an Erroneous Tax Lien

Another option that could, but does not, provide a remedy for the nominee is the administrative appeal of an erroneous tax lien. Section 6326 provides that any person may appeal to the Secretary after the filing of a notice of federal tax lien against his property, but only in such form and at such time as the Secretary prescribes by regulation.[394] The regulations for section 6326 provide that "any person" may appeal for release of a lien by alleging an error in the filing of the notice of lien.[395] However, the regulations limit the statute to four situations, none of which apply to an alleged nominee under ordinary circumstances.[396]

In fact, the Service has specifically considered and barred the possibility of a nominee petition under section 6326.[397] The preamble to the applicable final regulations notes that the Service received several comments involving substantive challenges to the lien "which Congress did not intend to include under section 6326."[398] It provides

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(2) 'equity jurisdiction' otherwise exists." Comm'r v. Shapiro, 424 U.S. 614, 627 (1976) (quoting *Williams Packing*, 370 U.S. at 7). It is virtually impossible for any transferee to meet the requirements of the exception, and courts consistently follow the *Williams Packing* interpretation and application of section 7421(b). *See* Lovell v. United States, 795 F.2d 976, 977 (11th Cir. 1986) (denying the plaintiffs' request for an injunction because they had not shown irreparable harm); Shannon v. United States, 521 F.2d 56, 60 (9th Cir. 1975) (restating the *Williams Packing* test); Ross v. United States, 861 F. Supp. 406, 407-08 (E.D.N.C. 1994) (denying the plaintiff's motion for an injunction because they had met their burden of showing the government could not establish a claim); Bailey v. Kelley, 372 F. Supp. 449, 452 (N.D. Ohio 1974) (restating the *Williams Packing* test); Tamburri v. Graham, 127 F. Supp. 47, 47-48 (D. Conn. 1953) (denying the plaintiff's request for an injunction because they had not shown irreparable harm). As a result, the courts cannot and will not exercise jurisdiction over a plea for injunction unless the petitioner has proven that the bar of section 7421(b) is inapplicable. *Shannon*, 521 F.2d at 56, 60.

393. I.R.S. Priv. Ltr. Rul. 1999-17-020, *supra* note 367, at 2.

394. I.R.C. § 6326 (2000).

395. Treas. Reg. § 301.6326-1(a) (1989).

396. *Id.* § 301.6326-1(b).

397. 56 Fed. Reg. 19,947 (May 1, 1999). It is the Service, rather than the Treasury, that considered the matter, because the section 6326 regulations are procedural regulations.

398. *Id.*

that "two parties suggested that the final regulations should provide the right to appeal the filing of nominee liens. However, whether or not a nominee lien is properly filed depends upon who actually owns the property in question, the liable taxpayer or the nominee."[399] The preamble concludes that such an issue is substantive and therefore does not come within the aegis of section 6326.[400] Accordingly, alleged nominees are denied even this small procedural advantage.

D. Suits for Civil Damages Arising from Unauthorized Collection Actions

Suits for civil damages are similarly unavailable. At its core, the Service's wrongful use of a nominee lien is an offense against the alleged nominee, and when denied administrative due process, the nominee's natural inclination may be to file suit. Generally, citizens do not have the right to sue the United States, even though the United States committed the offense, because its sovereignty renders it immune from suit.[401] Nevertheless, the federal government may statutorily waive its sovereign immunity.[402] Such a waiver must be unequivocally expressed through clear congressional consent, and absent such consent, courts do not have jurisdiction to entertain a suit.[403] Taxpayers have such a waiver in section 7433 for unauthorized collection actions.[404] Specifically, the Code states that a taxpayer may sue the United States for civil damages if an officer or employee of the Service recklessly, intentionally, or negligently disregards any provision under the Code or the Treasury Regulations.[405]

The nominee, however, does not have this remedy at her disposal. Such a result stems from the Supreme Court's requirements that any waiver of sovereign immunity must be "unequivocally expressed in statutory text," "not be implied," be "strictly construed,"[406] and not be "'enlarge[d] . . . beyond what the language requires.'"[407] Courts are bound by these mandates when applying section 7433, and, as a result, many who attempt to sue the United States under section 7433 are

399. *Id.*
400. *Id.*
401. Lehman v. Nakshian, 453 U.S. 156, 160 (1981).
402. *Id.*
403. United States v. Mitchell, 445 U.S. 535, 538 (1980).
404. I.R.C. § 7433(a) (2000).
405. *Id.* § 7433(b).
406. Lane v. Pena, 518 U.S. 187, 192 (1996).
407. United States v. Nordic Vill., Inc., 503 U.S. 30, 34 (1992) (alteration in original) (quoting Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983)).

denied for lack of subject matter jurisdiction.[408] For example, in *Matrix Development Corp. v. United States*, the plaintiffs sued the United States for wrongful placement of a nominee lien on their home.[409] The plaintiffs claimed that the court had jurisdiction to hear the case because section 7433 provided an applicable waiver of sovereign immunity.[410] Specifically, the plaintiffs claimed that they constituted "taxpayers" for purposes of the statute and therefore were entitled to civil damages.[411] The court dismissed the suit for lack of subject matter jurisdiction and in so doing stated that the plaintiffs were "innocent third parties, neither of whom is . . . the assessed taxpayer."[412] The court strictly construed the statute by stating that "the scope of § 7433 is limited to those taxpayers against whom the IRS is attempting to collect."[413] It rejected the plaintiffs' argument that the word *taxpayer* in section 7433 is meant to extend to "any person subject to internal revenue tax."[414] Consequently, an innocent third party, such as an alleged nominee, may not sue the United States under section 7433 for wrongful tax collection actions.[415]

In sum, an alleged nominee is denied due process at every turn. First, the alleged nominee cannot participate in CDP proceedings because the Service has determined that such rights only extend to "the taxpayer."[416] Second, while section 6901 could provide a mechanism for the application of CDP to transferees, courts and the Service have taken the position that nominees are not transferees within the meaning of the statute.[417] Consequently, alleged nominees are denied such rights as the right to participate in collections due process proceedings, the right to petition the Tax Court, and the right to seek an

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408. *See* Matrix Dev. Corp. v. United States, 815 F. Supp. 297, 300 (E.D. Wis. 1993); *see also* Ferrel v. Brown, 847 F. Supp. 1524, 1528 (W.D. Wash. 1993), *aff'd*, 40 F.3d 1049 (5th Cir. 1994) (holding that section 7433 suits are limited to claims by the direct taxpayer from whom the Service collected the tax); Wilkerson v. United States, 839 F. Supp. 440, 443 (E.D. Tex. 1993) (holding that section 7433, which allows a "taxpayer" to seek such civil damages against the United States, applies only to actions by the specific taxpayer against whom the Service's collection efforts were directed).

409. *Matrix*, 815 F. Supp. at 299.

410. *Id.* at 300.

411. *Id.*

412. *Id.* at 301.

413. *Id.* at 301.

414. *Id.* at 300-01.

415. *Id.* at 302.

416. Treas. Reg. §§ 301.6320-1(a)(2), Q&A-A7, 301.6330-1(a)(3), Q&A-A2 (as amended in 2007).

417. *See* Kellogg v. Comm'r, 88 T.C. 167, 175 (1987); INTERNAL REVENUE MANUAL, *supra* note 5, §§ 5.17.2.4.8.2, 5.17.14.1, 5.17.14.3.1.

offer in compromise.[418] Finally, the nominee lacks additional rights that are available to taxpayers and transferees, such as the right to an administrative appeal of an erroneous tax lien and the right to sue the United States for an unauthorized collection action.[419] As a result, alleged nominees have a limited number of ways in which to protect their interests in comparison to taxpayers who are, likewise, the targets of collection actions. In the next Part, we explore the actions that an alleged nominee can take in lieu of those described above. The avenues available to an alleged nominee are different in kind and scope from those available to taxpayers and transferees.

VI. WHAT CAN A NOMINEE DO?

Despite the regularity with which nominee lien cases are adjudicated in court, they are procedurally difficult for the target of the lien.[420] Once the Service has determined that a person is a nominee, the person, who is frequently unrepresented, must choose between alternative routes to challenge the lien.[421] These routes can be categorized as either administrative or judicial, and they are not mutually exclusive.[422] Of the two administrative procedures commonly pursued by taxpayers in Service collection actions, only one is available to the nominee: the Collection Appeals Program (CAP).[423] For reasons discussed below, this program has limited usefulness in the nominee context. A broader, more useful administrative option—the CDP hearing—is unavailable.[424]

The judicial procedures available to an alleged nominee fall into two categories: active and passive.[425] If an alleged nominee wants to take an active role, she may pay the assessed liability on the property, file an administrative refund claim and thereafter file a refund suit in

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418. *See* INTERNAL REVENUE MANUAL, *supra* note 5, § 5.12.2.6.4 (2007); *id.* § 5.17.14.3.1 (2000); I.R.S. Priv. Ltr. Rul. 1999-17-020, *supra* note 367, at 2.

419. *See supra* Part V.C.-D.

420. *See* INTERNAL REVENUE MANUAL, *supra* note 5, § 5.12.2.6.4 (stating that a nominee is not entitled to CDP procedures but may appeal under the Collection Appeals Program); I.R.S. Publ'n 1660, *supra* note 310, at 1 (stating that Collection Appeals Program procedures, unlike CDP procedures, do not allow for judicial review).

421. *See infra* Part VI.

422. *See infra* Part VI. Exhaustion of administrative remedies is a prerequisite to judicial review in some of the instances discussed below.

423. INTERNAL REVENUE MANUAL, *supra* note 5, § 5.12.2.6.4 (2007).

424. *Id.*

425. *See supra* Part IV.

district court.[426] Another active procedure the nominee may consider is a suit to quiet title under 28 U.S.C. § 2410.[427] If the nominee prefers a passive role, she may wait for the Service to levy on her property.[428] Once the Service delivers a notice of levy, she may challenge the levy in the district court under section 7426.[429]

A. *Administrative Procedures*

1. Amicable Joint Challenge with the Taxpayer

As noted above, according to the Service, a nominee against whom the Service has assessed a tax liability does not have any right to a CDP hearing under section 6320.[430] Depending upon the factual circumstances and the jurisdiction in which the taxpayer resides, however, it may be feasible to collaborate with the taxpayer whose debt resulted in the lien.[431] A collaboration of this sort, in which the alleged nominee would act as a behind-the-scenes participant, could have both positive and negative aspects.

If collaboration is a viable option, the taxpayer from whose debt the lien arose may request a CDP hearing by completing Form 12153 "Request for a Collection Due Process Hearing."[432] On the form, a taxpayer must provide the reasons underlying her request for relief, which could include information and arguments related to the nominee lien.[433] The taxpayer may also raise the appropriateness of other aspects of the Service's collection action: collection alternatives such as an installment agreement, offer in compromise, posting a bond, or substitution of other assets; appropriate spousal defenses; and the existence or amount of tax, but only if the taxpayer did not receive a notice of deficiency or did not otherwise have an opportunity to dispute the tax liability.[434]

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426. *See* United States v. Williams, 514 U.S. 527, 530 (1995) (describing a plaintiff who took these steps).

427. I.R.C. § 2410 (2000).

428. *Id.* § 6331 (2000 & Supp. IV 2004) (authorizing the Service to collect unpaid taxes by levy upon the property subject to a lien).

429. *Id.* § 7426 (2000).

430. INTERNAL REVENUE MANUAL, *supra* note 5, § 5.12.2.6.4 (2007); Treas. Reg. § 301.6320-1(a)(2), Q&A-A7 (as amended in 2007).

431. *See* Forman v. United States, 2005-1 U.S. Tax Cas. (CCH) ¶ 50,418, at 88,194 (N.D. Ill. 2005). In *Forman*, the Northern District of Illinois held that it had no jurisdiction over a husband's claim regarding a nominee lien against his wife's property. *Id.* This, however, does not prevent a taxpayer from raising the issue in an administrative hearing.

432. I.R.S. Form 12153 (rev. Nov. 2006).

433. *See id.*

434. I.R.S. Notice CC-2006-019, *supra* note 56, at 19-22.

The option for early administrative review of evidence regarding ownership and transferal of property is the primary reason why an alleged nominee would attempt to work behind the scenes with a taxpayer to defeat the nominee lien. The opportunity to present additional information to the Service can be very valuable. In rare instances, a taxpayer in a CDP hearing may successfully argue against his own interest that the property at issue properly belongs to the alleged nominee. More likely, however, collaboration with the taxpayer will be useful only in more limited circumstances, namely, those where the taxpayer is willing to assume responsibility for the liability. For instance, section 6325 provides that the Service may release the lien in return for a bond or substitute property, or the Service may release the lien if the taxpayer's remaining assets are sufficiently in excess of the amount owed.[435] The Service may also release the lien if it accepts a taxpayer's offer in compromise.[436] Where such agreements reduce the amount of the debt owed, the taxpayer may advocate for release of the nominee's property rather than his own. Because the taxpayer, rather than the alleged nominee, is responsible for strategy and advocacy in the CDP hearing, such an approach should not preclude the nominee from pursuing remedies on her own behalf.

Although it may sometimes be productive, taxpayer collaboration must be regarded with caution and skepticism. It cannot lead to judicial review of the alleged nominee's status because the taxpayer does not have a justiciable interest at stake.[437] In addition, the taxpayer's advocacy of an alleged nominee's position is, in effect, advocacy against the taxpayer's position. In other words, a nominee lien shifts a portion of the taxpayer's debt onto the alleged nominee, and only an honest person would argue in favor of resumption of that debt. The unfortunate effect of this economic requisite is that the taxpayer has no incentive to aid the nominee in the disposition of the nominee lien. Furthermore, collaboration that is open and notorious, or even collaboration that is kept secret but is discoverable in litigation, may work against the alleged nominee if the taxpayer's CDP effort fails. In such a case, the Service will have evidence that the nominee

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435. I.R.C. § 6325(a)(2) (2000) (providing that the Service may release the lien in return for a bond or substitute property).

436. I.R.C. § 7122 (West Supp. 2007).

437. *See* Forman v. United States, 2005-1 U.S. Tax Cas. (CCH) ¶ 50,418, at 88,194 (N.D. Ill. 2005) (holding that because the husband had disclaimed interest in the property subject to the nominee lien, he lacked an injury that would establish his standing to sue).

and the taxpayer remain in contact, and it may seek to use the taxpayer's willingness to make a financial sacrifice for the nominee as evidence of a close relationship. These facts cut against an alleged nominee's argument that the property transfer in question was valid, and they may allow the Service to depict the alleged nominee and taxpayer as a single economic unit rather than two disinterested parties who entered into an arm's length transaction.

Finally, even if the potential benefit of collaboration outweighs its evidentiary risk, it is procedurally difficult to coordinate. The Service is required to notify a taxpayer that it has filed an NFTL within five days of the filing.[438] The taxpayer then has thirty days to request a hearing with the Office of Appeals.[439] A nominee lien, however, is processed separately.[440] The taxpayer's thirty-day window, and indeed, his collection due process hearing, may come and go before the Service pursues an alleged nominee's property. As a result, a collaborative effort will only be possible in those cases where either the taxpayer anticipates the nominee lien or where the Service's revenue officer is both informed and efficient in collection. Unfortunately, it is uninformed and inefficient revenue officers who are most likely to be the culprits in attachments of erroneous nominee liens. As a result, collaborative effort will likely be impossible in those few cases where it could be beneficial.

2. The Collection Appeals Program

The CAP, which provides a narrower opportunity for review, is more widely available than the CDP hearing.[441] CAP coverage includes administrative appeals of federal tax liens, including nominee liens; levies on wages, property or bank accounts; the seizure of property; and the denial or termination of an installment agreement.[442] CAP allows an alleged nominee to appeal the lien before or after the Service files it, and it also allows the administrative appeal of denied requests to withdraw an NFTL.[443] While the CAP procedure is quicker than other options and is available to many individuals under a variety

438. I.R.C. § 6320(a)(2) (2000).

439. *Id.* § 6320(a)(3); I.R.S. Publ'n 1660, *supra* note 310, at 1.

440. *See* INTERNAL REVENUE MANUAL, *supra* note 5, § 5.12.2.6.5 (2007) (describing the process for preparing a nominee lien).

441. I.R.S. Publ'n 1660, *supra* note 310, at 3 ("The CAP procedure is available under more circumstances than Collection Due Process (CDP).").

442. *Id.*

443. *See id.* (outlining the procedures available under CAP and noting that a taxpayer may bring an appeal under CAP either before or after the Service has filed a lien).

of circumstances, a major disadvantage of the procedure is that once the Office of Appeals has reached a decision, there is no right to judicial review of that decision.[444]

CAP proceedings may be separated into two categories: those where contact is initiated by the taxpayer and those where it is initiated by a revenue officer.[445] As a result of the Service's internal procedure, it is usually the first category of CAP proceedings that is relevant to an alleged nominee. This is because the Service, although not required by statute to do so, typically sends a notice of federal tax lien designated "nominee" or "alter ego" to an alleged nominee.[446] The notice provides the nominee with notice of the problem and an impetus to confront the Service.

According to *IRS Publication 1660*, if an individual is interested in pursuing a CAP proceeding and has been in contact with the Service only via notice, the individual must contact the Service to describe the actions which are in dispute, to explain why there is disagreement, and to present a solution to the controversy.[447] If an agreement cannot be reached, the individual must notify the Service that he wishes to appeal its decision.[448] The Service employee whom the individual has contacted must honor the request and refer the individual to a manager.[449] Within twenty-four hours, a manager will contact the individual, at which time the manager, after listening to the individual's basis for disagreement, will make a decision on the case.[450] If the individual disagrees with the decision of the manager, the case will be sent to an appeals officer for review.[451]

The second category of CAP proceedings applies to an individual who has been contacted by a revenue officer regarding the collection action.[452] Although this category is a less likely fit, it may apply to alleged nominees in some instances. An individual who disagrees with the revenue officer's decision and wishes to appeal under CAP must

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444. *Id.* (stating that a taxpayer "cannot proceed to court if [the taxpayer does not] agree with Appeals' decision in [the] CAP case").

445. *Id.* (explaining the CAP process in cases where the taxpayer initiates contact with the Service and alternatively, where the taxpayer has been contacted by a Revenue Officer or has received an NFTL).

446. *See* Treas. Dep't Ltr. 3177 (DO) (rev. Apr. 2003).

447. I.R.S. Publ'n 1660, *supra* note 310, at 3.

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.*

request a conference with a collection manager.[453] If, after the conference, the issue has not been resolved, the individual may request an administrative appeal by completing Form 9423 *Collection Appeal Request* and presenting a proposed solution to the dispute.[454] It must be postmarked within two days of the conference with the collection manager.[455] If the request for an appeal is not sent within this time frame, the Service may resume the collection action if that action has been suspended.[456] After an appeals request on a lien, levy, or seizure has been timely submitted, the Service may suspend or continue suspension of its collection action while the appeals office considers the case, but it will not do so if suspension might put the collection action at risk.[457]

Of most importance, the decision made by the appeals officer is binding on the case.[458] Both the individual and the Service are bound by the decision, and neither may seek judicial review.[459] This is the primary and great disadvantage of pursuing CAP review. In instances where the Service has very little evidence about the alleged nominee, and where the alleged nominee can favorably fill informational gaps, the CAP review may be useful. These situations, however, may be few and far between. Prior to giving notice of a nominee lien, the Service must obtain written approval from its in-house attorneys, who are higher ranked than appeals officers.[460] Because the decision of an alleged nominee's status has already been reviewed by legal counsel for the Service, it is unlikely that the appeals office, which is staffed primarily by nonlawyers, will render a favorable decision except in the most egregious circumstances. Accordingly, the CAP process is rarely useful to an alleged nominee.

B. Judicial Procedures

Where administrative procedures fail, judicial procedures may succeed but only for alleged nominees who have time, patience, and sufficient funds. Three judicial courses of action are available to

453. *Id. I.R.S. Publication 1660* does not discuss the means by which an individual that wishes to appeal must request a conference.

454. *Id.*; *see also* I.R.S. Form 9423 (rev. Jan. 1999) (including instructions on submitting Form 9423 for the request of an administrative appeal).

455. I.R.S. Publ'n 1660, *supra* note 310, at 3.

456. *Id.*

457. *Id.* at 4.

458. *Id.*

459. *Id.*

460. INTERNAL REVENUE MANUAL, *supra* note 5, § 5.12.2.6.5 (2007).

alleged nominees, and each has significant drawbacks. A nominee may pursue a suit for refund,[461] a suit to quiet title to the disputed property,[462] or a wrongful levy suit.[463] These actions, like nontax actions, can be both lengthy and expensive.[464]

1. Suit for Refund

A nominee who has sufficient funds and who is sufficiently sure of success may pay the liability asserted against her property and claim a refund.[465] This, however, has not always been the case. Nominees' battle for access to the refund suit has been a protracted one.[466] Prior to the Supreme Court's decision in *United States v. Williams*, discussed above, there was conflict between the circuits as to whether a person who had not been assessed tax liability, but who paid the taxes of another under the duress of a federal tax lien, could bring an action to recover such payments.[467] The *Williams* court directly addressed this issue, albeit in a limited factual circumstance and without resolving other important questions, such as whether the merits of the underlying assessment can be challenged; whether a voluntary third-party payor, who did not remit funds under duress, can institute a refund action; and whether the existence of another remedy, such as a wrongful levy action, precludes the availability of a refund suit.[468]

The issue before the Court in *Williams* was whether the waiver of sovereign immunity in 28 U.S.C. § 1346(a)(1) authorized a refund suit by a party who had paid tax under protest to remove a federal tax lien from her property, even though the tax was not assessed against her.[469] In addressing the Service's argument that the Court lacked subject matter jurisdiction over the refund suit, the Court looked to the explicit language of § 1346(a)(1), which is broadly rendered as follows:

461. 28 U.S.C. § 1346(a)(1) (2000).

462. *Id.* § 2410.

463. I.R.C. § 7426(a)(1) (2000).

464. *See* cases cited *infra* notes 503-507. Because attorneys generally charge by the hour, protracted litigation can result in ballooning legal expenses.

465. *See* United States v. Williams, 514 U.S. 527, 529 (1995) (describing an alleged nominee who paid the liability and sued for a refund).

466. *See, e.g.*, Snodgrass v. United States, 834 F.2d 537, 539 (5th Cir. 1987) (ruling that a nominee could not sue the United States for a refund).

467. *Compare* Martin v. United States, 895 F.2d 992, 994 (4th Cir. 1990) (permitting a suit for refund by a person who had paid the taxes of another), *with Snodgrass*, 834 F.2d at 539 (dismissing for lack of jurisdiction a refund suit by a person who had paid the tax liability of another).

468. *Williams*, 514 U.S. at 535-36.

469. *Id.* at 530.

> "The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> (1) *Any* civil action against the United States for the recovery of *any* internal-revenue tax alleged to have been *erroneously* or illegally assessed or *collected*, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully *collected* under the internal-revenue laws. . . ."[470]

The Court pointed out that this language does not restrict the availability of suit to the person against whom the taxes are assessed; the language encompasses more.[471] The Court held that Ms. Williams' plea to recover tax "erroneously . . . collected" by the Service fell squarely within the language of the statute.[472]

Williams struck a blow on behalf of third-party payors, but if limited to its facts, its impact is limited to a rare and specific group of persons, to wit, those who are able to pay under duress.[473] When applying the *Williams* analysis, some courts may be unwilling to extend standing to third parties that pay the tax liability of another in the absence of duress.[474] Nonetheless, the refund suit remains an important, although severely limited, option.

2. Suit To Quiet Title

In situations where an alleged nominee cannot or does not wish to pay the debtor's tax liability and thereafter sue for a refund, she may seek predeprivation relief under 28 U.S.C. § 2410(a)(1) by filing a suit to quiet title.[475] The statute provides that

> the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter . . . to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien.[476]

The words quiet title include a suit to clear the cloud resulting from a federal tax lien.[477]

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470. *Id.* at 532 (emphasis in original) (quoting 28 U.S.C. § 1346(a)(1) (1988 and Supp. V 1993)).

471. *Id.* at 536.

472. *Id.* at 532.

473. *Id.* at 540.

474. *Id.* ("We do not decide the circumstances, if any, under which a party who volunteers to pay a tax assessed against someone else may seek a refund under § 1346(a).").

475. 28 U.S.C. § 2410(a)(1) (2000); *see also Williams*, 514 U.S. at 538 (describing predeprivation remedies).

476. 28 U.S.C. § 2410(a).

477. *See* United States v. Coson, 286 F.2d 453, 457 (9th Cir. 1961).

The waiver of sovereign immunity found in § 2410 is important to alleged nominees because a favorable judgment in a quiet title action against the government "shall have the same effect respecting the discharge of the property from the . . . lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated."[478] In order to obtain such a judgment, the section requires that the person filing the suit plead with particularity, and in the case of actions or suits involving liens arising under internal revenue laws, "the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice."[479] In addition, service of process upon the United States in such cases must be made by serving a copy of the complaint on the U.S. attorney for the district in which the action is brought or any other prescribed person as designated by the U.S. attorney as provided in § 2410(b).[480]

To an alleged nominee, a suit to quiet title presents distinct advantages and disadvantages. On the positive side, it provides the alleged nominee with a forum for adjudication of the validity of the Service's action. Such a forum is otherwise unavailable—unlike "transferees" under section 6901, alleged nominees do not have access to the prelevy administrative process or to the Tax Court.[481] Better yet, a court faced with a quiet title action is not limited to a review of the Service's administrative record.[482] Rather, it accepts new evidence.[483] This aspect of the suit is important because the Service does not always consult the alleged nominee when determining whether to place a lien on property.[484] As a result, it may miss key facts and later

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478. 28 U.S.C. § 2410(c).

479. *Id.* § 2410(b).

480. *Id.* The section further provides that one may also properly serve an

> [A]ssistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint . . . to the Attorney General of the United States at Washington, [D.C.]. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

Id.

481. *See supra* Part V.B.

482. *See* Juno Inv. Corp. v. United States, 93 A.F.T.R.2d (RIA) 2631, 2633 (D. Minn. 2004).

483. *Id.*

484. *See* INTERNAL REVENUE MANUAL, *supra* note 5, § 5.12.2.6.5 (2007) (describing the process for preparing a nominee lien).

refuse to consider them. A suit to quiet title provides the alleged nominee with a venue in which to present information that the Service may not have considered. Finally, a suit to quiet title may be advantageous because it can be filed in either state or federal court.[485] This versatility may allow an alleged nominee a wider selection of counsel from which to choose and may be of particular importance to low income taxpayers accused of holding a tax debtor's property (although any counsel not acting pro bono is likely to be expensive).

Although it has benefits, a suit to quiet title also has drawbacks. First and foremost, an alleged nominee bears the burden of proof in a quiet title suit.[486] Whereas section 6902 specifies that in transferee cases "the burden of proof shall be upon the Secretary to show that a petitioner is liable as a transferee of property of a taxpayer,"[487] in a quiet title action, the alleged nominee bears the burden of proof.[488] In addition, the government is entitled to a presumption of administrative regularity in quiet title actions.[489] An alleged nominee can only overcome this presumption by producing credible evidence that the Service did not follow a statutorily mandated procedure.[490] Even then, the Service may introduce proof to show that despite the alleged nominee's evidence, its assessment and collection procedures were appropriate.[491] The shifted burden of proof and presumption of regularity in a quiet title action leave an alleged nominee at a distinct disadvantage in comparison to transferees who may benefit from section 6902.

A second disadvantage of quiet title suits is the length of time and the amount of resources needed for their prosecution. Although this problem is by no means unique to quiet title actions, it is particularly troublesome to an alleged nominee who is denied the ability to mortgage or alienate property. In summary, while a quiet title suit may be an attractive option for an alleged nominee with an abundance of time, money, and evidence, it is a less than ideal solution in most

485. 28 U.S.C. § 2410(a) (2000). The Service is, of course, not precluded from seeking removal from state to federal court in appropriate cases.

486. *See* Alexander Hamilton Life Ins. Co. of Am. v. Virgin Islands, 757 F.2d 534, 541 (3d Cir. 1985).

487. I.R.C. § 6902(a) (2000).

488. *See Alexander Hamilton Life Ins. Co. of Am.*, 757 F.2d at 541.

489. *See* Coplin v. United States, No. 91-1338, 1991 U.S. App. LEXIS 30335, at *9 (6th Cir. Dec. 17, 1991).

490. *Id.*

491. *Id.*; Sumpter v. United States, 302 F. Supp. 2d 707, 719 (E.D. Mich. 2004) (stating that because the plaintiffs produced prima facie evidence of valid title, the burden shifted to the Service to prove that its liens took precedence over the alleged nominees' interests).

instances. It does not afford a timely solution and, more importantly, it shifts the burden of proof to the alleged nominee.[492] Finally, bringing a quiet title suit remains an expensive option. Accordingly, it is not a viable alternative in many cases.

3. Wrongful Levy Action

An alleged nominee who is unable or unwilling to pursue a refund action or a quiet title suit will be forced to take a reactive, rather than an active, approach. The alleged nominee must wait for the Service to levy the property in question. Afterward, she can bring a wrongful levy under section 7426(a)(1).[493] The statute states in relevant part:

> If a levy has been made on property or property has been sold pursuant to a levy, and any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.[494]

To prevail in a wrongful levy suit, an alleged nominee must show that the levy was wrongful and that her interest is superior to that of the United States.[495] A levy is wrongful when it is made against property that does not belong to the delinquent taxpayer.[496] Unlike a quiet title action, the burden of persuasion in a wrongful levy action falls initially upon the Service, which must show that the taxpayer has an interest in the seized property[497] or that there is a nexus between the taxpayer and the seized property.[498] If the government carries its burden, the onus shifts to the alleged nominee to prove that the delinquent taxpayer has no interest in the levied property.[499]

Despite its favorable distribution of the burden of proof, the wrongful levy suit has an obvious and nearly fatal drawback: it is not available until the Service levies the alleged nominee's property. In

492. *See Coplin*, 1991 U.S. App. LEXIS 30335, at *9.

493. I.R.C. § 7426(a)(1) (2000).

494. *Id.*

495. Bremen Bank & Trust Co. v. United States, 131 F.3d 1259, 1262 (8th Cir. 1997).

496. *See* Pate v. United States, 949 F.2d 1059, 1060 (10th Cir. 1991) ("[A] tax lien can attach only to a property interest owned by the delinquent taxpayer . . . .").

497. Sec. Counselors, Inc. v. United States, 860 F.2d 867, 869 (8th Cir. 1988).

498. Oxford Capital Corp. v. United States, 211 F.3d 280, 283 (5th Cir. 2000).

499. *Id.*

other words, under section 7426(a)(1), the alleged nominee cannot bring suit until the Service has seized the liened-against property. This is no minor inconvenience because under section 6502(a)(1), the Service has at least a decade during which to levy against the alleged nominee.[500]

The Service, as one might imagine, is *not* built for speed, and litigating a federal case is also a long process.[501] Even a brief look at wrongful levy and foreclosure cases reveals that tax collection actions put peoples' lives on hold, not for weeks or months, but for years.[502] For instance, the wrongful levy case of *Hatchett v. United States* opens, "This case began more than twenty-five years ago . . . ."[503] Likewise, the court in *United States v. Scherping* rendered a decision on a foreclosure action that the Service began seventeen years earlier.[504] In *United States v. Swan*, the court rendered a foreclosure decision eighteen years after the taxpayers' debt arose.[505] And even the oft-cited *Towe* case was lengthy; the Service waited until 1989 to attack a 1981 transfer of property to an alleged nominee.[506] The appellate court finally rendered its decision in 1993, twelve years after the contested transfer.[507] Because these actions, and the collection procedures that precede them, are so lengthy, the wrongful levy suit is not a viable option for alleged nominees who need to improve, leverage, or dispose of their property.

C. Summary of the Available Remedies

A handful of administrative and judicial avenues are available to an alleged nominee who wishes to challenge the Service's action, but none of them are satisfactory for a person who is wrongly accused, particularly if that person is of limited means or has limited time. In addition, the available remedies are not coextensive with those provided to similarly situated taxpayers and transferees. Administratively, an alleged nominee could challenge the Service's

500. I.R.C. § 6502 (2000).

501. *See, e.g.*, Doug Rendleman, *A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform*, 39 AKRON L. REV. 1089, 1113 (2006) ("Litigation takes a long time.").

502. *See* United States v. Swann, 467 F.3d 655, 656 (7th Cir. 2006); Hatchett v. United States, 2003 FED App. 0176P, ¶ 3 (6th Cir.); United States v. Scherping, 187 F.3d 796, 799 (8th Cir. 1999).

503. 2003 FED App. 0176P, ¶ 3 (6th Cir.).

504. 187 F.3d at 799.

505. 467 F.3d at 656.

506. Towe Antique Ford Found. v. IRS, 791 F. Supp. 1450, 1451-52 (D. Mont. 1992), *aff'd*, 999 F.2d 1387 (9th Cir. 1993).

507. *Towe*, 999 F.2d at 1387.

action via the CAP or possibly work together with the actual taxpayer in an amicable joint challenge of the lien by way of a CDP hearing. Both of these avenues, however, may present considerable problems. If the alleged nominee uses CAP, she loses her ability to seek judicial review of the Appeals Officer's final decision, which is binding on both parties.[508] An amicable joint challenge with the "taxpayer" raises difficult issues, such as justiciability of the taxpayer's interest, the necessary personal relationship between the "taxpayer" and the nominee, and the effect of that relationship on the Service's determination of the alleged nominee's status. Furthermore, the CAP challenge is unlikely to succeed because, in most cases, a nominee lien is preapproved by attorneys within the Service who outrank the appeals officers that are assigned to the CAP process.[509] The odds, then, of prevailing administratively under either procedure are not favorable.

An alleged nominee may also consider judicial remedies, including a refund suit, a suit to quiet title, or a wrongful levy suit. Each of these actions has at least one serious drawback. In a refund suit, the alleged nominee must pay the tax debtor's liability.[510] In a suit to quiet title, the alleged nominee bears the burden of disproving the government's interest.[511] Finally, in a wrongful levy action, the alleged nominee must wait for the Service to levy on liened-upon property, which could take a decade.[512] In each of these cases, the alleged nominee is forced to cover the cost of court and counsel and is denied the ability to alienate his or her property for years. Although these suits may eventually bring the alleged nominee satisfaction in a technical sense, none of them can truly be described as satisfying. Finally, they are quantitatively different from the procedures available to similarly situated taxpayers and transferees.

VII. PROPOSAL AND CONCLUSION

Taxpayers, transferees, and alleged nominees are similarly situated in collections actions in a crucial aspect: each holds property that the Service seeks to seize. The goals of the RRA—to curb abuses of power, to prevent unauthorized collections, and to provide a forum

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508. I.R.S. Publ'n 1660, *supra* note 310, at 3.

509. INTERNAL REVENUE MANUAL, *supra* note 5, § 5.12.2.6.5. (2007).

510. *See* United States v. Williams, 514 U.S. 527, 540 (1995).

511. *See* Alexander Hamilton Life Ins. Co. v. Virgin Islands, 757 F.2d 534, 541 (3d Cir. 1985).

512. I.R.C. §§ 7426(a)(1), 6502(a) (2000).

for settlement—are equally relevant to each group. The facially obvious distinctions among the groups, based on subjective intent and the origin of liability, have no bearing on the Service's collection function. Neither can the difference in collection processes be justified on the basis of unclean hands. A nominee complicit in tax avoidance is in the same position, vis-à-vis the Service, as a tax debtor or the recipient of fraudulently conveyed property.

Technical distinctions based upon transfer of title are similarly unhelpful. One could make a technical argument that because the transferor in a fraudulent conveyance transaction actually conveys property, the conveyance may defeat the automatic lien that arises against all of a tax debtor's property under section 6321. If the automatic lien is defeated, separate assessment and administrative processes, and a separate lien, are needed to collect against the transferee under section 6901. In contrast, if the transfer to an alleged nominee is merely a legal fiction, the transfer would not defeat the automatic lien under section 6321, and no separate assessment would be necessary under section 6901. This technical distinction would make the utmost sense as a basis for discrimination against alleged nominees but for a single fact: the legal test for fraudulent conveyance and the legal test for nominee status are, by and large, identical.

Despite their nearly identical descriptions, the Service's treatment of fraudulent conveyance collections and nominee collections are dissimilar in quantity, quality, and timing. As described in detail above, the discrepancies are not minor. While taxpayers and transferees have full access to the provisions of sections 6320 and 6330, alleged nominees do not.[513] Transferees and taxpayers have the right to notice of the Service's lien filing, an administrative hearing, an administrative appeal, and a judicial appeal, while alleged nominees do not.[514] Furthermore, in judicial proceedings, section 6902 places the onus of proving transferee status on the Service, while in nominee cases, it is the nominee who bears the burden of proof.[515]

Because no viable reason exists for disparate treatment of taxpayers, transferees, and alleged nominees, we propose that all targets of Service collection actions be afforded equal treatment. This goal could be accomplished quickly and easily through an amendment

513. *See supra* Part V.
514. *See supra* Part V.
515. *See supra* Part VI.B.

to section 6901 and the Treasury Regulations that defines *transferee*.[516] Although the existing provisions *could*, and as a matter of fairness *should*, apply to alleged nominees, the Service has not interpreted them as such. Therefore, Congress and the Treasury should make clear that nominees are transferees not only in everyday parlance but also in the application of section 6901. Doing so would put alleged nominees on the same footing as other targets of collection actions, be that favorable or unfavorable ground, and it would prevent the Service from selecting the level of due process afforded to a third-party collections case through its choice of transferee or nominee status. Thus, our proposed amendment would create a more equitable collections process while rendering that process less susceptible to governmental abuse.

516. *See* Treas. Reg. § 301.6901-1(b) (1967) ("As used in this section, the term "transferee" includes an heir, legatee, devisee, distributee of an estate of a deceased person, the shareholder of a dissolved corporation, *the assignee or donee of an insolvent person*, the successor of a corporation, a party to a reorganization as defined in section 368, *and all other classes of distributees*." (emphasis added)).

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